

89-1142

No. \_\_\_\_\_

Supreme Court, U.S.

FILED

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In The  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DOMINIC FERLAUTO, JAMES KARAS, WILLIAM  
NIXON THOMAS MARTIN and WILLIAM LUCK,  
*Petitioners,*  
v.

THE STATE OF NEW JERSEY, CITY OF JERSEY  
CITY, TOWNSHIP OF MONTCLAIR and CITY OF  
NEWARK, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF NEW JERSEY

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73 142



## **Question Presented**

1. Do the 1986 Amendments to the federal Age Discrimination Employment Act, 29 *U.S.C.* §621 *et seq.* permit early mandatory retirement of law enforcement officers and firefighters who perform primarily supervisory and/or administrative duties?

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**In The  
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DOMINIC FERLAUTO, JAMES KARAS, WILLIAM  
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CITY, TOWNSHIP OF MONTCLAIR, CITY OF  
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**PETITION FOR WRIT OF CERTIORARI TO  
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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in this proceeding on August 2, 1989.

### Opinion Below

The opinion of the New Jersey Supreme Court is reported at *Boylan, et als v. State of New Jersey*, 116 N.J. 236 (1989) and is reprinted in the appendix hereto. (*Hereinafter Boylan II.*) The opinion reversed a decision of the State's appellate division published at *Boylan, et als v. State of New Jersey*, 222 N.J. Super. 313 (App. Div. 1988) also reprinted in the appendix hereto. (*Hereinafter Boylan I.*)

### Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. By the petition, Petitioner's seek this Court's review of final judgment of the New Jersey Supreme Court entered on August 2, 1989 in the matter of *Boylan, et als, v. State of New Jersey, et als.*, 116N.J. 236 (1989).

On October 20, 1989 the Honorable Justice Brennan granted an application to extend the time for filing the petition to December 30, 1989.

## **List of Parties**

The parties to the proceeding below were Plaintiffs-Respondents Edwin Boylan, John E. Butler, Dominic G. Ferlauto, Thomas Fitzpatrik, John W. Gardner, Edward J. Gray, William P. Hayes, John Hussey, James N. Karas, William N. Luck, Thomas W. Martin, William R. Nixon and Albert Schlee and Defendants-Appellants State of New Jersey, City of Jersey City, City of Irvington, Town of Montclair and City of Newark.

In addition, the following were parties to consolidated cases:

1. Plaintiffs-Respondents William J. Comer, Kenneth Peterson, George Sbarra, James Houn, Edward Woods and John Gardner and Defendants-Appellants City of Paterson, City of Passaic, Township of Belleville, City of Hoboken City of Margate City, Town of Montclair.

2. Respondent Alexander M. Beattie, Jr. and Appellant State of New Jersey.

3. Respondents Gioacchino Fiorentino, Firemen's Mutual Benevolent Association-Local 27, David Slaughter and City of Ocena City and Appellants New Jersey Department of the Treasury-Division of

Pensions, Douglas R. Forrester and the Police and Fire Retirement System of New Jersey.

**Statute Involved**

The statutes at issue are two subsections of the Age Discrimination in Employment Act 29 U.S.C. §621 *et seq.*

29 U.S.C. 623(i) provides:

(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or discharge any individual because of such individual's age if such action is taken -

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act. 29 U.S.C. § 623(i).

29 U.S.C. §630(j) and (k) provide:

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected

with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

### Statement of the Case

On December 15, 1967, the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* was enacted. The purpose of the Act was to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination. *Hodgson v. First Federal Savings and Loan Association of Broward County, Florida*, 455 F.2d 818, 820 (5th Cir. 1972). Essentially, the Act prohibited mandatory age-based retirement of individuals under age seventy unless age is shown to be a bona fide occupational qualification. 29 U.S.C. §621(f)(1).

In *EEOC v. Wyoming*, 460 U.S. 226 (1983), this Court concluded that Congress could properly extend application of the Act consistent with the Tenth Amendment of the United States Constitution to the states. That decision was rendered on March 2, 1983.

In response to the *Wyoming* decision, former New Jersey State Attorney General Irwin Kimmelman issued *Formal Opinion No. 5* (1983). The opinion advised that in the absence of facts demonstrating that mandatory retirement ages were a valid *bona fide* occupational qualification, the applicable provisions of the State uniformed services pension statutes, which require mandatory retirement of their members prior to age seventy, were invalid and unenforceable. Thus, from that time to the present, public safety officers throughout the State continued in their employment believing that they could work until age seventy if they chose.

On October 31, 1986 the federal legislature adopted amendments to the the Age Discrimination



Employment Act. The amended Act prohibits mandatory age based retirement. However, §623(i) of the statute as amended permits mandatory retirement of certain statutorily defined "law enforcement officers" and "firefighters". The subsection provides:

(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or discharge any individual because of such individual's age if such action is taken -

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act. 29 U.S.C. § 623(i).

§630(j) and (k) of the Act defines law enforcement officers and firefighters as follows:

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged

in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

The New Jersey statute at issue here is the Police and Firemens' Retirement System, *N.J.S.A. 43:16A-1 et seq.* Reimplementation of the statute is not required by the federal law, but is permissive instead. However, in a letter written by New Jersey Assistant Attorney General William Harla to Douglas R. Forrester, Director of the State Division of Pensions, State Attorney General W. Cary Edwards advised that under *General Electric Co. v Packard Bamberger & Co.*, 14 *N.J.* 209 (1953) the State's mandatory retirement laws must once again be enforced. In *General Electric*, it was held that where a state statute is declared unconstitutional or invalid because it conflicts with federal legislation, the state statute is merely unenforceable or suspended by existence of the federal legislation. Under the rule of the case, the same holds true where, as is the case here,

Congress, by express enactment, removes an obstacle to the operation of state legislation. *Id.* 218.

The Attorney General's letter instructed Director Forrester to take immediate steps toward the goal of reimplementation. Accordingly, on February 19, 1987, Forrester issued a memorandum to the Certifying Officers of the Police and Firemens' Retirement System (PFRS) directing that mandatory retirement at age sixty-five would once again be enforced as of June 1, 1987.

Petitioners herein assert that they are not law enforcement officers and firefighters as defined by the Act. And, in response to the directive issued by Director Forrester, Petitioners, on May 29, 1987, applied to the Law Division of the Superior Court of the State of New Jersey for preliminary injunctive relief. A hearing was held before the Honorable Paul B. Thompson, J.S.C. and temporary restraints were granted enjoining Respondents from forcing Petitioners to retire until June 19, 1987.

On June 5, 1987, the matter was transferred to the Appellate Division of the Superior Court of New Jersey and on November 2, 1987, the matter was argued before a full appellate panel, the Honorable Judges Petrella, Dreier and Baime, JJ.A.D. sitting. On January 20, 1988, the Court rendered its decision in an opinion authored by the Honorable James J. Petrella, P.J.A.D. entitled *Boylan v. State of New Jersey*, 222 N.J. Super. 313 (App. Div. 1988). The Court held, *inter alia*, that if Petitioners' employment duties were limited to primarily supervisory and/or administrative functions, Petitioners were exempted from the otherwise allowed mandatory retirement of police officers and firefighters. Thereafter, the matter was remanded to the State Office of Administrative Law for hearings on the question of Petitioners' duties.

Respondents thereafter petitioned for and were granted certification to the New Jersey Supreme Court. On August 2, 1989, that body rendered its decision. Hereinafter, *Boylan II*. In *Boylan II*, *Boylan I* was reversed, the court holding that the Age Discrimination

Employment Act does not distinguish between supervisory and/or administrative public safety officers and those officers engaged in "on the line" duties. *Boylan II* at 249. Thus the court below mandated the early retirement of all public safety officers over the age of sixty-five.

On August 18, 1989 Petitioners moved the New Jersey Supreme Court for a stay of its mandate and on September 7, 1989, that court granted a conditional stay until September 20, 1989.

Thereafter, timely application for a stay was made to Justice William J. Brennan, Jr. who denied the motion on September 18, 1989.

On October 10, 1989 Petitioners applied to this Court for an extension of time to file the instant petition for writ of certification until December 30, 1989.

**Reasons for Granting the Writ**  
**The Construction Placed on 29 U.S.C. §630(j)**  
**and (k) by the New Jersey Supreme Court**  
**Promotes Arbitrary Age Discrimination and**  
**thus Contravenes the Legislative Intent to**  
**Promote Employment of Older Persons Based**  
**on Their Ability Rather Than Age**

*Introduction: The Issue Presented Is One of National Importance*

The narrow issue presented in this case is one of statutory construction. However, this Court's interpretation of 29 U.S.C. §§630(j) and (k) will impact on the nationally important issues of age discrimination and age based mandatory retirement. And, although the instant matter is limited to a small group of police officers and firefighters from a single state, the issue presented affects older public safety officers in every state and municipality in the nation.<sup>1</sup> In the past, this Court has found that actions involving interpretation of the Age Discrimination and Employment Act and age discrimination in general are worthy of certification and

<sup>1</sup>. The *Boylan* case was but one of four matters consolidated for hearing in New Jersey. The same issue of statutory construction was also raised in *EEOC v. Com. of Mass.*, 672 F. Supp. 557 (D. Mass. 1987).

review by the Court in full. See, e.g., *EEOC v. Wyoming*, *supra*; Justice Marshall, in his dissenting opinion in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) aptly noted the importance of the issue:

While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health or life expectancy of the retired person. 427 U.S. at 327.

In the past decade many lower courts have also acknowledged the detrimental effects of involuntary retirement on older workers who wish to continue working. In *EEOC v. Chrysler Corp.*, 546 F. Supp. 54 (D.C. Mich. 1982) *aff'd*, 733 F.2d 1183 (6th Cir. 1984) the court granted a preliminary injunction because the employees being forcibly retired manifested

psychological and physiological distress that could not be compensated by post trial relief. Specifically, the court found that plaintiffs in that action suffered emotional distress, a decrease in feelings of usefulness, a contracted social life, increased cigarette consumption, depression, lassitude, sexual problems and a reduced sense of well being. *Id.* at 70. In addition, the court found that excluding Plaintiffs from their employment would cause a deterioration in their work skills, which is significant when older workers by definition have fewer productive years left. Furthermore, those years may be irretrievable in view of the very real possibility of protracted litigation. *Id.* at 71.

In *EEOC v. County of Calumet*, 26 EPD 31,819 (E.D. Wis. 1981) a temporary restraining order was granted because the court found irreparable injury in a decline in morale caused by forced retirement which caused harm to an important part of the psyche. Similarly, in *EEOC v. California Dept. of Youth Authority*, 29 FEP Cases 1147 (E.D. Cal. 1981) the court found the loss of self respect, self worth and



emotional well being that an employed person derives from knowing that society finds sufficient value in his services to compensate him for them, constituted irreparable harm, thus justifying the necessity of a preliminary injunction. *See also, Farkas v. N.Y. State Dept. of Health*, 554 F. Supp. 24 (N.D.N.Y. 1982).

The court in *EEOC v. City of Bowling Green*, 37 FEP Cases 963 (W.D. Ky. 1985) granted a preliminary injunction recognizing that the police officer to be mandatorily retired could collect damages and be reinstated at a later time if he prevailed on the merits. Notwithstanding that, the court found sufficient irreparable harm would result from the officer's inability to keep up with current matters in the police department in addition to the inherent anxiety and emotional stress which flow from compulsory retirement. *Id.* at 965.

In sum then, the issue before this Court is one of vital importance and national significance and is thus worthy of plenary review by this Court. *See e.g., Layne & Bowler Corp. v. Western Well Works*, 261 U.S.

387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Finally, the likelihood of multiple litigation both on the state and federal levels requires that this Court review the 1986 amendments to the ADEA provide a definitive interpretation of the statute.

*Contrary to the Decision Below, 29 U.S.C. §630(j) and (k) Must be Construed so as to Exclude Public Safety Officers Who Perform Primarily Supervisory and/or Administrative Duties*

In the litigation below Petitioners contended, *inter alia*, that the 1986 amendments to the ADEA do not apply to higher ranking officers performing administrative or supervisory duties prior to enactment of the 1986 Amendments. As noted above, §630 of the amended Act reads in pertinent parts:

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or

detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

Petitioners Dominic Ferlauto, William Luck and Thomas Martin are deputy chiefs of police. The duties of deputy chiefs are primarily supervisory and administrative. Deputy chiefs rank second in the chain of command and are responsible for formulating and carrying out departmental policy. Petitioner James Karas is a police captain. Police captains rank third in the chain of command and perform supervisory duties. Petitioner Karas supervises the Identification Bureau and Licensing Bureau for the Montclair Township Police Department. Petitioner William Nixon is a fire captain. He is charged with maintaining the Montclair Township municipal alarm system and training new firefighters. Petitioner Nixon is not classified within the department's chain of command and reports directly to his chief.

Had Congress intended to permit mandatory retirement of all police officers and firefighters regardless of the nature of their duties it could have done so by

using plain language of the sort used by the New Jersey Legislature in *N.J.S.A. 10:3-1*, the State counterpart to the federal legislation at issue here. That statute describes a universal class of public safety officers as "... a member of a police or fire department in the service of any county or municipality thereof,..." But Congress did not. A literal reading of the federal statute indicates that Congress intended to make two classes of public safety officers: The first class consists of "on the line officers", while the second class includes officers in supervisory or administrative positions. The statute also speaks in the present tense in that it refers to an individual who "is transferred" from a line position to a supervisory or administrative position. Each Petitioner herein holds a supervisory or administrative position and has held such a position for a number of years prior to enactment of the 1986 ADEA Amendments. It is respectfully submitted that it is a fair and reasonable interpretation of the statute to exempt from mandatory retirement supervisory and administrative officers already holding such positions at the time the ADEA was amended. That interpretation permits affected public

safety officers to continue their employment and retire as planned. The interpretation applied by the New Jersey Supreme Court forces the retirement of all public safety officers who are sixty-five and over without regard to the fact that these individuals have already proven their ability to continue in their employment past the age of sixty-five. Moreover, it completely ignores the fact that these officers maintained their employment with the justifiable expectation that they could work until the age of seventy and have planned their retirement accordingly.

In construing a federal statute, it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses the legislative purpose. *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) *rehearing denied*, 470 U.S. 1065 (1985). A court's duty in interpreting statutory language is to find that interpretation which can most firmly be said to be embedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes the Congress manifested. *C.I.R. v. Engle*, 464 U.S. 206, 217 (1984). The Age Discrimination

Employment Act was intended to keep qualified working people working. Therefore, the definitions of public safety officers embodied in the statute should be limited to its precise parameters.

*The Court Below Improperly Relied on the Language of 5 U.S.C. §§8331(20) and (21), Thus This Court Must Correct the Error to Effectuate the ADEA's Remedial Purpose*

In *Boylan II* the New Jersey Supreme Court relied heavily on the language contained in the federal civil service statute, 5 U.S.C. §8335(b) and 5 U.S.C. §§8331(20) and (21). *Opinion at pgs. 11 - 14.* That statute allows the federal government to mandatorily retire law enforcement officers and firefighters. In the *Boylan I* the State Appellate Court cogently discussed the foregoing issue. Judge Petrella wrote:

In the absence of a clear Congressional definition of the quoted transfer clause, we are free to interpret it in a way which comports with the general sense of the federal statute and the salutary purpose of the ADEA to bar discrimination in discharging an employee based on arbitrary age classifications.

Moreover, as we have noted, the federal statutes and regulations regarding firefighters and

law enforcement officers were primarily concerned with eligibility for pension benefits and the method of obtaining entitlement to credits towards retirement.

\* \* \* \*

Because the federal regulations are concerned primarily with eligibility for merit bonuses and obtaining credits under the federal retirement acts, they provide little guidance here.

\* \* \* \*

An interpretation of New Jersey's statutes which allows high ranking supervisors who are not involved primarily and directly in firefighting activities to fall outside the ambit of the mandatory early retirement provisions of P&FRS, and a similar interpretation with respect to such high-ranking officers in law enforcement whose duties are not primarily involved with apprehending criminals, is consonant with a proper interpretation of the ADEA and the LAD. The restriction of mandatory early retirement provisions to other than supervisory positions furthers the basic intent of both the federal and State laws against age discrimination. The exemption granted the states by the 1986 amendments to the ADEA must be construed and interpreted in accordance with the manifest intention of the entire legislation. Obviously, the intent was to limit the situations where early retirement could be mandated. Hence, a sensible interpretation of the definition of firefighter and law enforcement officer is warranted to further the broader purpose of preventing unwarranted age discrimination. (*Citations omitted.*) *Boylan I, supra*, 222 N.J. Super. 329-331.

*Boylan I* is in accord with the view expressed by the only federal court that has had occasion to review

the matter in a published opinion. In *EEOC v. Com. of Mass.*, 672 F. Supp. 557 (D.Mass. 1987), District Judge Mazzone considered the very question presented by Petitioners herein. In *Massachusetts* the defendant Commonwealth refused to hire any person over the age of thirty-five for appointment to the position Motor Vehicle Examiner. Defendant based its authority to so limit these appointments on M.G.L. c. 90 §29, as amended by St. 1985, c. 768 which states that "[a]n applicant who has passed his thirty-fifth birthday shall not be appointed as an examiner" unless the examination was taken before he reached age thirty-five. Plaintiff EEOC contended that the state statute violated the ADEA's prohibition against discrimination in hiring on the basis of age. Defendant countered that the 1986 amendments to the ADEA exempt law enforcement officers for whom a state has established maximum hiring ages from the Act's protection.

Judge Mazzone began his analysis with a recitation of 29 U.S.C. §623(i), the provision exempting certain public safety officers from the general protection



of the ADEA. Thereafter, he reviewed the definition of "law enforcement officer" as set forth in 29 U.S.C. §630(k). He concluded:

The ADEA thus permits a state to set a maximum hiring age for law enforcement officers whose primary duties are the investigation, apprehension, or detention of individuals suspected or convicted of criminal offenses. *Id.* at 558.

Having made that finding the Court attempted to determine whether the duties of a Motor Vehicle Examiner are within the statutory purview. On that issue Judge Mazzone wrote:

In summary, I am unable to conclude on this record that the primary duties of an Examiner are those described in the ADEA. While the defendants have presented me with a number of facts from which I could speculate that an Examiner's duties fall within those described in the ADEA, I have not yet been shown that the usual and primary duties of those holding the title of Examiner encompass the enumerated law enforcement activities.

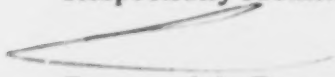
Accordingly, I reserve my decision on the defendants' motion for partial summary judgment pending submission of further affidavits or other papers from defendants containing the information described above. *Id.* at 561.

The *Massachusetts* decision is strikingly similar to *Boylan I* and represents sound judicial thinking. Both decisions should be given the approbation of this Court.

## Conclusion

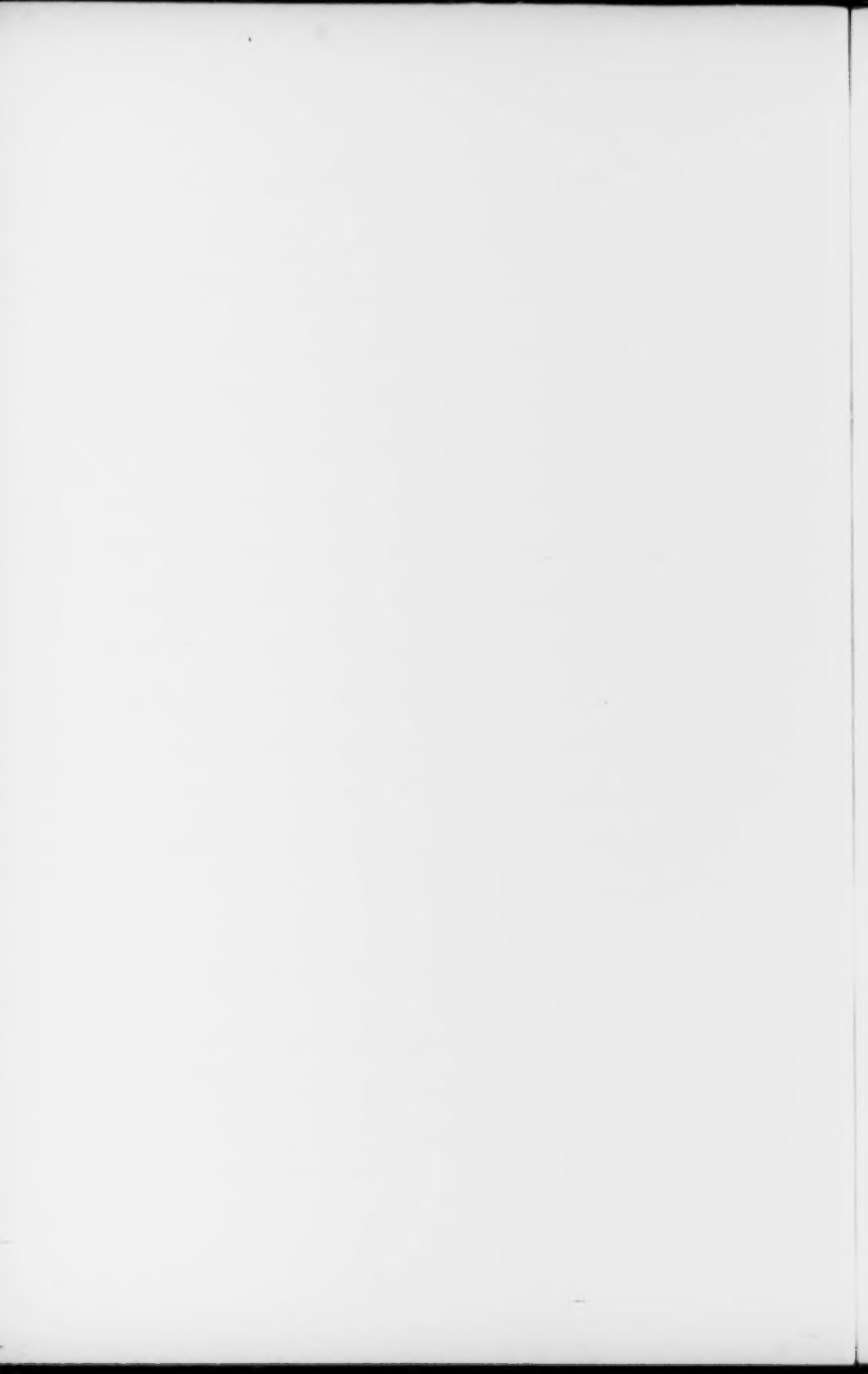
The right to work is the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. See, *Truax v. Raich*, 239 U.S. 33, 41 (1915). The public safety officers petitioning this Court for certification have all given the State of New Jersey lifetimes of exceptional service. Their knowledge, expertise and leadership ability is invaluable. Mandatory retirement is a cruel euphemism camouflaging age discrimination and forced unemployment. It severs productive persons from their livelihood, shears their sense of self worth and squanders their talents. With this in mind, and for the foregoing reasons, it behooves this Court to grant the petition.

Respectfully submitted,



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Dated: 12/17/89



## **Appendix**



Supreme Court of the United States

No. A-291

Dominic Ferlauto, et al.,

Petitioners

v.

New Jersey, et al.

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O R D E R

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UPON CONSIDERATION of the application of counsel  
for the petitioner,

IT IS ORDERED that the time for filing a petition  
for a writ of certiorari in the above-entitled case, be and  
the same is hereby, extended to and including

December 30, 1989.

/S/ William J. Brennan, Jr.  
Associate Justice of the Supreme  
Court of the United States

Dated this 20  
day of October, 1989.





EDWIN BOYLAN, JOHN E. BUTLER, DOMINIC G. FERLAUTO, THOMAS FITZPATRICK, JOHN W. GARDNER, EDWARD J. GRAY, WILLIAM P. HAYES, JOHN HUSSEY, JAMES N. KARAS, WILLIAM N. LUCK, THOMAS W. MARTIN, WILLIAM R. NIXON, AND ALBERT J. SHLEE, PLAINTIFFS-RESPONDENTS, v. STATE OF NEW JERSEY, CITY OF JERSEY CITY, CITY OF IRVINGTON, TOWN OF MONTCLAIR, AND CITY OF NEWARK, DEFENDANTS-APPELLANTS.

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WILLIAM J. COMER, FIRE CHIEF OF THE CITY OF PATERSON; KENNETH PETERSON, FIRE CHIEF OF THE CITY OF PASSAIC; GEORGE SBARRA, FIRE CHIEF OF THE TOWNSHIP OF BELLEVILLE; JAMES HOUN, FIRE CHIEF OF THE CITY OF HOBOKEN; EDWARD WOODS, FIRE CHIEF OF THE CITY OF MARGATE CITY; JOHN W. GARDNER, FIRE CHIEF OF THE TOWN OF MONTCLAIR; AND NEW JERSEY PAID FIRE CHIEFS' ASSOCIATION, PLAINTIFFS-RESPONDENTS, v. THE CITY OF PATERSON, THE CITY OF PASSAIC, THE TOWNSHIP OF BELLEVILLE, THE CITY OF HOBOKEN, THE CITY OF MARGATE CITY, THE TOWN OF MONTCLAIR, AND ALL MUNICIPALITIES OF THE STATE OF NEW JERSEY, DEFENDANTS-APPELLANTS.

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ALEXANDER M. BEATTIE, JR., APPELLANT, v. CITY OF CLIFTON, N.J. (A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY); AND THE STATE OF NEW JERSEY, N.J. DIVISION OF PENSIONS, RESPONDENTS.

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GIOACCHINO FIORENTINO, FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION—LOCAL 27; DAVID SLAUGHTER; AND CITY OF OCEAN CITY, RESPONDENTS, v. NEW JERSEY DEPARTMENT OF THE TREASURY—DIVISION OF PENSIONS; HON. DOUGLAS R. FORRESTER, DIRECTOR OF THE DIVISION OF PENSIONS; AND THE POLICE AND FIREMEN'S RETIREMENT SYSTEM OF NEW JERSEY, APPELLANTS.

Argued January 31, 1989—Decided August 2, 1989.

#### SYNOPSIS

Challenges were made to enforcement of early mandatory retirement provision in state statutes for law enforcement

officers and fire fighters. On appeal from determination of Division of Pensions, Department of Treasury, the Superior Court, Appellate Division, Petrella, P.J.A.D., 222 N.J.Super. 313, held that the ADEA allowed mandatory retirement of only those officers and fire fighters involved in "active" duty and remanded. On State's petition for certification, the Supreme Court, Pollock, J., held that exception to the ADEA permitted mandatory retirement of state and local law enforcement and fire fighting officers who had been promoted to administrative and supervisory positions.

Reversed.

#### 1. Civil Rights ¶9.15

Exception to the Age Discrimination in Employment Act's general prohibition against age discrimination, which permits forcible retirement of law enforcement officers and fire fighters over age 65, applies whether those officers are "line" employees or supervisors. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

#### 2. Civil Rights ¶9.15

Exception to the Age Discrimination in Employment Act which permitted states and localities to forcibly retire law enforcement officers and fire fighters over age 65 in supervisory positions was not in violation of the New Jersey law against discrimination; although LAD was amended to provide that nothing in act should be construed to interfere with any bona fide retirement, pension or employee benefit plan as long as provisions of plan were not used to establish age for mandatory retirement, another statute was amended to provide, notwithstanding any provision of any other law, that certain public employees could be subject to mandatory retirement. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634; N.J.S.A. 10:3-1, 10:5-2.1.

## 3. Constitutional Law ⇨213.1(1)

Age is not suspect or "quasi-suspect" classification for purposes of equal protection analysis.

## 4. Civil Rights ⇨2.1

## Constitutional Law ⇨238.5

Fire fighters in supervisory positions who were between 65 and 70 years of age and who were forcibly retired on basis of age were not deprived of equal protection of laws through exception to the Age Discrimination in Employment Act which permits forcible retirement; age classification had rational relationship to legitimate state interest of providing states and localities with same flexibility as federal government in requiring retirement of its employees and to preserve morale of younger officers and fire fighters who aspire to administrative or supervisory positions. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

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*Michael R. Clancy*, Deputy Attorney General, argued the cause for appellants State of New Jersey, et al. (*Donald R. Belsole*, Acting Attorney General of New Jersey, attorney, *Patrice M. Connell*, Deputy Attorney General, on the briefs).

*Ernest G. Ianetti* argued the cause for respondents Edwin Boylan, et al. (*Brown & Brown*, attorneys).

*James V. Segreto* argued the cause for respondents William J. Comer, et al. (*Segreto & Segreto*, attorneys).

*Mervyn R. Montgomery* argued the cause for respondents Alexander M. Beattie, et al.

*Bruce M. Gorman* submitted a letter in lieu of a brief on behalf of respondents Gioacchino Fiorentino, et al.

*Dennis J. Alessi* submitted a brief on behalf of *amicus curiae* New Jersey State Firemen's Mutual Benevolent Association (*Fox and Fox*, attorneys, *Dennis J. Alessi* and *David I. Fox*, of counsel).

*Thomas A. Gonzoph* submitted a brief on behalf of *amicus curiae* The Fire Fighters Association of New Jersey (*Schlesinger, Schlosser & Foy*, attorneys).

*Kenneth I. Nowak* submitted a brief on behalf of *amicus curiae* New Jersey State Police Benevolent Association (*Zazzali, Zazzali, Fagella & Nowak*, attorneys, *James R. Zazzali*, of counsel).

The opinion of the Court was delivered by

POLLOCK, J.

These appeals involve challenges to the enforcement of early mandatory retirement provisions for law-enforcement officers and firefighters who are enrolled in the Police and Firemen's Retirement System (P & FRS) or the Public Employees Retirement System (PERS). We hold that the 1986 amendments to the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 to -34, permit the early mandatory retirement of such officers and firefighters who serve primarily in an administrative or supervisory capacity.

The Appellate Division succinctly summarized the relevant facts:

The facts are not disputed in any of these appeals. All plaintiffs were advised by a February 19, 1987 directive issued by the Division of Pensions (Division) in the State Department of the Treasury, based on legal advice from the Attorney General, that they had to retire because they were over age 65. In the appeal brought by Edward Boylan and others, all of the plaintiffs serve as officers in various positions in police and fire departments. The plaintiffs include one police chief, four deputy chiefs, three police captains and one detective. They also include one fire chief, two battalion chiefs and two captains from fire departments. An additional plaintiff named in the complaint is one superintendent Nixon. Each plaintiff is between the age of 65 and 70 years and is a member of either the P & FRS or the PERS.

In the Comer appeal plaintiffs, paid fire chiefs in their respective municipalities, are between ages 65 and 70, and are members of the P & FRS. In the third appeal Beattie is a deputy fire chief who is 68 years of age. In the Fiorentino appeal the plaintiffs include a fire captain, the City of Ocean City, a collective bargaining representative and Firemen's Mutual Benevolent Association, Local 27.

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The plaintiffs in each of these matters, with the exception of the Beattie appeal, instituted suit seeking injunctive relief against the enforcement of the mandatory retirement requirement. The matters were transferred to the Appellate Division in three of the appeals on orders entered by the trial court. Beattie took a direct appeal to this court from the mandatory retirement directive issued by the Division of Pensions and sought and obtained injunctive relief pending disposition of the appeal. [222 N.J.Super. 313, 317-18 (footnote omitted).]

As that summary indicates, plaintiffs held supervisory positions in county or municipal, police, and fire departments in New Jersey. Each is a member of either the P & FRS or PERS pension system and each is over sixty-five but under seventy. The statutory provisions of both systems generally require members who are law-enforcement officers and firefighters to retire at age sixty-five whether they serve in supervisory or front-line positions. N.J.S.A. 43:15A-99; N.J.S.A. 43:16A-5(1).

Plaintiffs, like many other people who reach retirement age, are reluctant to see their careers come to an end. That reluctance is reinforced in the present case by various changes in federal legislation over the last two decades. In these changes, Congress has sought to balance the competing interests of employees, young and old, and the public. Our task is not to strike a balance of our own, but to recognize the balance struck by Congress.

# I

In 1983, the United States Supreme Court held that the tenth amendment to the United States Constitution, which reserves to the states the powers not delegated to the United States, did not bar the extension of the ADEA to the States. *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). The Court found the ADEA to be a valid exercise of federal authority under the Commerce Clause. *Id.* at 243, 103 S.Ct. at 1064, 75 L.Ed.2d at 33. Later that year, the Attorney General of New Jersey issued a formal opinion concluding that the pension provisions requiring mandatory retirement before age seventy for uniformed police officers and firefighters were

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unenforceable under the ADEA, unless those provisions were a bona fide occupational qualification. 5 *Op.N.J.Att'y Gen.* (1983). The amendments to the ADEA that are the subject of this action took effect in 1986. Based on those amendments, the Attorney General issued a second formal opinion concluding that the 1986 amendments allowed the mandatory retirement provisions in the New Jersey pension plans. 12 *Op.N.J.Att'y Gen.* (1987).

Against that background, the Appellate Division held that the 1986 amendment allowed the mandatory retirement of only those plaintiffs involved in "active" law-enforcement or firefighting efforts. 222 *N.J.Super.* at 335-36. Interpreting the definitional sections of the 1986 amendments, the Appellate Division further held that the exception to the ADEA's general prohibition against age discrimination would not apply to supervisory firefighters not "directly" and "primarily" involved in firefighting or to supervisory law-enforcement officers not "directly" involved in law enforcement. *Id.* at 331. The court then remanded the case to the Division of Pensions for the determination whether the 1986 amendments applied to the individual plaintiffs. We granted the State's petition for certification, 111 *N.J.* 648 (1988), and now reverse.

## II

As the preceding statement of the factual and procedural history indicates, this case turns on the meaning of the 1986 amendments to the ADEA. When interpreting the 1986 amendments, our goal obviously is to discern the intent of Congress. *Philbrook v. Glodgett*, 421 *U.S.* 707, 713, 95 *S.Ct.* 1893, 1998, 44 *L.Ed.2d* 525, 533 (1975). We begin with the words of the statute.

Enacted in 1967, the ADEA bans discrimination in the hiring or discharge of employees on the basis of age. 29 *U.S.C.* § 623(a)(1). One of its main purposes is to prevent "the setting of arbitrary age limits regardless of the potential for job

performance." 29 U.S.C. § 621(a)(2). The ADEA, however, permits employers to make employment decisions on the basis of age when it is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). In addition, the ADEA states that it shall not be unlawful for an employer "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan," providing such plan is "not a subterfuge to evade the purpose of this chapter." 29 U.S.C. § 623(f)(2). No such employment benefit plan, however,

shall excuse the failure to hire any individual, and no such seniority plan or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. [*Ibid.*]

As originally enacted, the ADEA protected only individuals between age forty and sixty-five and did not apply to public employees. 29 U.S.C. § 630(b)(2); § 631(a).

In 1974, Congress amended the ADEA by expanding its definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency \* \* \*." 29 U.S.C. § 630(b)(2); *Pub.L.* 93-259 § 28(a)(1), (2), April 8, 1974, 88 *Stat.* 74. Four years later Congress further amended the ADEA to include individuals who were "less than 70 years of age." 29 U.S.C. § 631(a); *Pub.L.* 95-256, § 3(a), April 6, 1978, 92 *Stat.* 189, 190. Then in 1986, Congress further amended the ADEA. *Pub.L.* 99-592, § 2(c)(1), Oct. 31, 1986, 100 *Stat.* 3342, 3344. One amendment removed the age "cap" of seventy, so that with few exceptions, the Act now protects all workers over forty. 29 U.S.C. § 631(a). Of even greater relevance to the present case, the 1986 amendments established for a period of seven years an exception to the prohibition against age discrimination against law-enforcement officers and firefighters. Before proceeding to the provisions of the 1986 amendments, we note that a bill has been introduced that would amend the ADEA to establish a permanent exception for state



and local firefighters and law-enforcement officers. *H.R.* 1200, 100th.

Turning to the words of the statute, 29 *U.S.C.* § 623(i) provides:

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State, \* \* \* to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

- (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
- (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

Congress defined law-enforcement officers and firefighters under the ADEA in subsections (j) and (k) of 29 *U.S.C.* § 630:

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, *including an employee engaged in this activity who is transferred to a supervisory or administrative position.*

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, *including an employee engaged in this activity who is transferred to a supervisory or administrative position.* For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution. [Emphasis added.]

[1] A straightforward reading of these definitions indicates that Congress intended this exception to include not only rank-and-file officers presently performing "line" functions, but also officers who once performed those duties and have since been promoted to supervisory or administrative positions.

In defining "firefighter," 29 *U.S.C.* § 630(j) limits that term to employees whose duties "are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment \* \* \*." The next subsection defines "law enforcement officer" and limits that term to employees who are "primarily" involved in the "investigation, apprehension, or detention \* \* \*." 29 *U.S.C.* § 630(k). The sense of each



definition is to cover firefighters and law-enforcement officers who have "line" responsibilities. Each subsection, moreover, contains a phrase beginning with the participle "including." 29 U.S.C. § 630. When the participial phrases are read, as we believe they must be read, with reference to the basic definitions of "firefighter" and "law enforcement officer," it becomes clear that the purpose of the phrases is to include supervisors and administrators within the basic definitions. Consequently, we disagree with the Appellate Division, which concluded that such an interpretation would render the adverbs "primarily" and "directly" surplusage in the definition of "firefighter" and "law enforcement officer." 222 N.J. Super. at 329. The purpose of those adverbs is to exclude from the definition of covered employees those firefighters and law-enforcement officers who are not administrators or supervisors and who are not "primarily" and "directly" involved in "line" activities. We find nothing in the legislative history of the 1986 amendments, or in that of predecessor bills, to support the Appellate Division's conclusion that Congress intended the participial phrases to apply to officers who are promoted to supervisory positions as a pretext to avoid mandatory retirement. See 222 N.J. Super. at 330. To the contrary, the legislative history is consistent with a plain reading of the statute that leads to the conclusion that Congress intended the exception from the ADEA to apply to all law-enforcement officers and firefighters, whether or not they are "line" employees or supervisors.

Congress modelled the 1986 ADEA amendments on a section of the 1984 federal Civil Service statute allowing the federal government to retire mandatorily federal law-enforcement officers and firefighters. 5 U.S.C. § 8335(b). Consequently, the definition of "firefighter" and "law enforcement officer" in the 1986 amendments to the ADEA is virtually identical to the definition of those terms in the 1984 Civil Service statute. Under that statute, 5 U.S.C. § 8331(20), a "law enforcement officer" is defined as

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an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position. [Emphasis added.]

Under 5 U.S.C. § 8331(21), a "firefighter" is defined as an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this position who is transferred to a supervisory or administrative position. [Emphasis added.]

Before the enactment of the ADEA, the Civil Service Commission adopted regulations interpreting the Civil Service statute. Those regulations make clear that the statute allows the mandatory retirement of federal law-enforcement officers and firefighters in supervisory positions. Thus, the regulations concerning the definition of "law enforcement officer," 5 C.F.R. § 831.903 (1983 reg.), accompanying the 1984 federal statute state in relevant part:

(c) "Law enforcement officer" also includes an employee who is transferred to a position the primary duties of which are not the investigation, apprehension, or detention of persons suspected or convicted of offenses against the United States, or from such a position to another position, if—

(1) Service in the position transferred to follows service in a law enforcement position without—

(i) a break in service of more than three days; or

(ii) intervening employment that was not as a law enforcement officer. [Emphasis added.]

Similarly, 5 C.F.R. § 831.90(b) (1983 reg.) states:

(b) Firefighter also includes an employee who is transferred to the position of a supervisor the primary duty of which are not to control an extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, or from such a position to another such position, if—

(1) Service in the position transferred to follows service in a law enforcement position without—

(i) A break in service of more than three days; or

(ii) Intervening employment that was not as a firefighter \* \* \*.

Following the unmistakable import of these regulations, courts have ruled that they apply to firefighters or law-enforcement officers who transfer to supervisory positions. See *Ellis v. United States*, 222 Ct.Cl. 65, 610 F.2d 760, 765 (1979); *Key v.*

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*Office of Personnel Management*, 26 M.S.P.R. 64 (1985); *Nielsen v. Office of Personnel Management*, 24 M.S.P.R. 364 (1984).

When considering the 1986 amendments to the ADEA, Congress realized that courts had interpreted the Civil Service statute to allow the forced retirement of firefighters and law-enforcement officers from supervisory positions. In a report recommending the rejection of *H.R. 5310*, a predecessor of the bill that ultimately became the 1986 ADEA amendments, the chairman of the Select Committee on Aging in the House of Representatives wrote: "Many, if not most, of the law enforcement officers and firefighters mandatorily retired [under 5 U.S.C. § 8335(b)] are retired from supervisory or administrative positions \* \* \*." *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel (Myths and Realities)*, Report by the Chairman of the House Select Committee on Aging (Chairman Edward R. Roybal), 98th Cong., 2d sess. at 5 (1984) (emphasis added).

The legislative history of the 1986 amendments is replete with additional evidence that Congress intended to permit the mandatory retirement of state and local law-enforcement and firefighting officers who had been promoted to administrative and supervisory positions. The most persuasive evidence of that intent appears in a hearing conducted by the House of Representatives Subcommittee on Employment Opportunities with regard to *H.R. 1435*, the purpose of which was to exempt police and firefighters in states and localities from the coverage of the ADEA. That hearing was conducted on the same day as a hearing on *H.R. 4154*, which was ultimately adopted as the subject 1986 amendments to the ADEA. At the hearing on *H.R. 1435*, Representatives Matthew Rinaldo and William Hughes of New Jersey, sponsors of both *H.R. 4154* and *H.R. 1435*, debated with Representative Martinez, chairman of the subcommittee. The following excerpt from the debate suffices for our purposes:

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Mr. Martinez: We normally think of age-related ability in terms of jobs and activities associated with, let's say, the patrol officer or the firefighter who is actually on the ladder truck or actually involved in fighting the fire. *But there are certainly jobs that, regardless of what age one attains, can be done by people at an older age without the physical fitness requirement, for example, administrative jobs, both in the police department and fire department.*

In a bill that simply allows the States to set a retirement age somewhat based on physical ability, how do you deal with those people who could go on being productive to a city or a State or county based on their experience and knowledge?

\* \* \* \* \*

I guess what I am asking is have we thought about any way to allow for that exception? And I guess right now we haven't.

Mr. Rinaldo: Well, I will tell you, there is one way in rare circumstances. *I know in our State the head of the State police is over the mandatory retirement age and the State passed legislation allowing an exception. So, I guess you could do that in individual States.*

Mr. Martinez: \* \* \* I was looking for some mechanism that might be added that might take care of that exception.

But, of course, as Congressman Rinaldo points out, it might create more of a nightmare and more of a hassle and hazard than if we just left it to the discrepancy [sic] of the locals. [*Exemptions for Police and Firefighters under the Age Discrimination in Employment Act, Hearing Before the House Subcommittee on Education and Labor, 99th Cong. 2d Sess. 6-9 (1986) (emphasis added).*]

Further evidence that Congress intended to allow the states to retire supervisors is found in the 1984 Report by the Chairman of the House Select Committee on Aging, which states:

Ironically, this legislation would not only allow forced retirement at any age for the police officer in a patrol car *but also for the police chief who sits at a desk; not only for the firefighter who enters burning buildings but for the dispatcher or desk clerk who never leaves his or her chair for hazardous duty. [Myths and Realities, supra, iv (emphasis added).*

The legislative history also contains repeated statements by congressmen and senators emphasizing that their goal was to provide states and localities with the same flexibility as that enjoyed by the federal government in compelling the mandatory retirement of law-enforcement and firefighting personnel. *See, e.g., H.R. 4154, 99th Cong., 2d sess., 132 Cong. Rec. 5641 (1986) (Statement of Rep. Roukema); Cong. Rec. S 16854 (daily ed. Oct. 16, 1986) (statement of bill sponsor, Sen. Bradley); Retirement Policies for Public Safety Officers, Hearing Before the*

Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 99th Cong., 1st Sess. 9, 30, 182 (March 18, 1986) (Statements of bill sponsors, Sen. Bradley & Sen. Ford; Joint Statement of bill sponsors, Rep. Hughes and Rep. Rinaldo). For example, Sen. Bradley of New Jersey, a sponsor of *H.R. 4154*, stated that the bill

allow[s] States and municipalities the flexibility to determine entry and retirement ages for their public safety officers and firefighters. . . . Since 1974, Federal firefighters and law enforcement officers, including members of the FBI, secret service, and Federal prisons, must retire at age 55. This amendment extends the exemption for the next 7 years to States and municipalities to allow them to determine retirement and entry ages for their own public safety officers and firefighters, just as Congress has done for similarly situated Federal employees. [Cong. Rec. § 16854 (daily ed. Oct. 16, 1986).]

In addition, the legislative history shows that Congress was concerned with the vulnerability of states to lawsuits following the decision of the United States Supreme Court in *EEOC v. Wyoming*, *supra*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18. Cong. Rec. S. 16853 (daily ed. Oct. 16 1986) (statement of Sen. Ford); Hearing before the Senate Subcommittee on Labor and Human Resources, 99th Cong., 1st Sess., *supra*, at 178 (joint statement of Rep. Hughes and Rep. Rinaldo); Hearing on Age Discrimination in Employment Act Amendments before the House Committee in Education and Labor, 98th Cong., 2d Sess. 23 (1984) (statement of Rep. Rinaldo). Congress evidently feared that the *Wyoming* decision would spawn expensive litigation that would force every state to establish that its mandatory retirement provisions were bona fide occupational qualifications. For example, Representative Roukema expressed her hope that *H.R. 4154* would limit such lawsuits against state and local governments because "[d]efending these suits placed enormous burdens on state and local governments in terms of time and money spent on litigation." 99th Cong., 2d Sess., 132 Cong. Rec. 5642 (1986); *see also* Hearing Before the Senate Subcommittee on Labor and Human Resources, 99th Cong., 1st Sess., *supra*, at 16 (statement of Sen. Ford). Congress also feared that these lawsuits would produce conflicting and contradictory results. Hearing on Age Discrimination in

Employment Act Amendments before the House Committee in Education and Labor, *supra*, at 22 (statement of Rep. Rinaldo). In light of these clear statements, we reject as inconsistent with the intent of Congress the Appellate Division's requirement that mandatory retirement be resolved on a case-by-case basis, depending on whether the employee is "primarily" involved in law-enforcement activities or "primarily" and "directly" involved in firefighting duties. 222 N.J. Super. at 331.

In sum, we find that the plain meaning of "firefighter" and "law enforcement officer" indicates that Congress intended to except states from the requirements of the ADEA concerning mandatory retirement of law-enforcement and firefighting officers who are transferred from line functions to administrative or supervisory positions. We reject the Appellate Division's conclusion that federal Civil Service laws "provide little guidance" for the asserted reason that they are "concerned primarily with eligibility for merit bonuses and obtaining credits under the federal retirement acts." 222 N.J. Super. at 330. The extensive legislative history suggests that Congress understood that law-enforcement officers and firefighters in supervisory positions could be forced to retire under the federal Civil Service law. That history also demonstrates that Congress intended to give states and localities flexibility to require the mandatory retirement of their employees. Consequently, we conclude that plaintiffs can be required to retire under the State P & FRS and PERS plans.

[2] In the course of its decision, the Appellate Division noted that its interpretation of the ADEA was "consonant" with the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. The LAD states in relevant part that

(i) it shall be an unlawful employment practice, or, as the case may be, unlawful discrimination:

a. For an employer, because of the " " age " " of any individual " " to refuse to hire or employ or to bar or to discharge from employment such individual " " . [N.J.S.A. 10:5-12.]



In 1985, the LAD was amended to provide that nothing in the Act should be construed to interfere with any bona fide retirement, pension, employee benefit, or insurance plan or program "provided that the provisions of those plans or programs are not used to establish an age for mandatory retirement." N.J.S.A. 10:5-2.1. During the same year, however, another statute, the Employment in Public Service Law, was amended to provide, notwithstanding any provision of any other law, that certain public employees could be subject to mandatory retirement, including "a member of a police or fire department employed in the service of the State or of any county or municipality thereof." N.J.S.A. 10:3-1. Thus, we do not perceive LAD to require any different result from that intended by Congress in the ADEA.

[3, 4] Like the Appellate Division, 222 N.J. Super. at 331-33, we find no merit in the argument raised by plaintiffs Boylan and Comer that the ADEA results in a violation of their right to equal protection of the laws. Initially, we note that age is not a suspect or "quasi-suspect" classification. *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520, 524-25 (1976); *Taxpayers Ass'n of Weymouth Township v. Weymouth Township*, 80 N.J. 6, 38-42 (1976). Nor are we dealing with a fundamental right or interest, which is "expressly guaranteed or clearly implied by the federal constitution." *Levine v. Department of Insts. and Agencies*, 84 N.J. 234, 258 (1980) (citing *Taxpayers Ass'n of Weymouth Township*, *supra*, 80 N.J. at 38). Consequently, plaintiffs are remitted to establishing that the age classification lacks a rational relationship to a legitimate state interest. *Taxpayers Ass'n of Weymouth Township*, *supra*, 80 N.J. at 40. Although we are sensitive to plaintiffs' contention that mandatory retirement has a profound psychological and physiological effect on older employees, the Legislature could have reasonably concluded that law-enforcement officers and firefighters in supervisory positions should be subject to

mandatory retirement. *See* 222 N.J. *Super.* at 318-19. Without belaboring the point, the mandatory retirement of some employees opens opportunities for others. Hence, Congress could have sought not only to provide states and localities with the same flexibility as the federal government, *supra* at 247, but also to preserve the morale of younger law-enforcement officers and firefighters who aspire to administrative or supervisory positions. Although we in no way denigrate the benefit of the experience of senior employees or the effect on them of forced retirement, Congress could have concluded that the demands of firefighting and law enforcement are such that the public would be better served by permitting states and localities to require firefighters and law-enforcement officials to retire at age sixty-five.

The judgment of the Appellate Division is reversed.

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EDWIN BOYLAN, JOHN E. BUTLER, DOMINIC G. FERLAUTO, THOMAS FITZPATRICK, JOHN W. GARDNER, EDWARD J. GRAY, WILLIAM P. HAYES, JOHN HUSSEY, JAMES N. KARAS, WILLIAM N. LUCK, THOMAS W. MARTIN, WILLIAM R. NIXON, ALBERT J. SHLEE, PLAINTIFFS-APPELLANTS, v. STATE OF NEW JERSEY, CITY OF JERSEY CITY, TOWNSHIP OF IRVINGTON, TOWNSHIP OF MONTCLAIR, CITY OF NEWARK, DEFENDANTS-RESPONDENTS. (A-4578-86T5)

WILLIAM J. COMER, FIRE CHIEF OF THE CITY OF PATERSON; KENNETH PETERSON, FIRE CHIEF OF THE CITY OF PASSAIC; GEORGE SBARRA, FIRE CHIEF OF TOWNSHIP OF BELLEVILLE; JAMES HOUN, FIRE CHIEF OF THE CITY OF HOBOKEN, EDWARD WOODS, FIRE CHIEF OF THE CITY OF MARGATE CITY; JOHN W. GARDNER, FIRE CHIEF OF THE TOWNSHIP OF MONTCLAIR; AND, NEW JERSEY PAID FIRE CHIEFS' ASSOCIATION, PLAINTIFFS-APPELLANTS, v. THE CITY OF PATERSON, THE CITY OF PASSAIC, THE TOWNSHIP OF BELLEVILLE, THE CITY OF HOBOKEN, THE CITY OF MARGATE CITY, THE TOWNSHIP OF MONTCLAIR AND ALL MUNICIPALITIES OF THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS. (A-4833-86T5)

ALEXANDER M. BEATTIE, JR., PLAINTIFF-APPELLANT, v. CITY OF CLIFTON, AND THE STATE OF NEW JERSEY, DIV. OF PENSIONS, DEFENDANTS-RESPONDENTS. (A-4833-86T5)

GIOACCHINO FIORENTINO, FIREMENS MUTUAL BENEVOLENT ASSOCIATION—LOCAL 27; DAVID SLAUGHTER; AND CITY OF OCEAN CITY, PLAINTIFFS-APPELLANTS, v. NEW JERSEY DEPARTMENT OF THE TREASURY—DIVISION OF PENSIONS; HON. DOUGLAS R. FORRESTER, DIRECTOR OF THE DIVISION OF PENSIONS; AND THE POLICE AND FIREMEN'S RETIREMENT SYSTEM OF NEW JERSEY, DEFENDANTS-RESPONDENTS. (A-4503-86T5)

Superior Court of New Jersey  
Appellate Division

Argued and Submitted November 2, 1987—Decided  
January 20, 1988.

#### SYNOPSIS

Challenges were made to enforcement of early mandatory retirement provision in state statutes for law enforcement

officers and fire fighters who were enrolled in Police and Firemen's Retirement System or Public Employees Retirement System. On appeal from determination of Division of Pensions, Department of Treasury, the Superior Court, Appellate Division, Petrella, P.J.A.D., held that to extent that fire fighters and law enforcement officers are not primarily and directly involved in types of duties defined by Age Discrimination in Employment Act, they were exempted from mandatory early retirement provisions of state pension acts.

Remanded.

### 1. Civil Rights ⇐9.15

States ⇐18.22

Extension of Age Discrimination in Employment Act to states effectively repealed New Jersey's statutes requiring mandatory retirements at specified ages; however, after 1986 federal amendment to Act, New Jersey's public employee pension law was substantially reinstated. Age Discrimination in Employment Act of 1967, §§ 3, 4(i), 12, 29 U.S.C.A. §§ 622, 623(i), 631; N.J.S.A. 43:16A-5, 53:5A-4; N.J.S.A. 43:15A-59 (Repealed).

### 2. Courts ⇐89

Although formal interpretation of statutory provisions by state Attorney General may be strongly persuasive, that opinion is not binding on state appellate court.

### 3. Civil Rights ⇐9.15

Supervisory law enforcement officers who are not directly involved in law enforcement and supervisory fire fighters who are not directly and primarily involved in fire fighting are not subject to federal exception in the 1986 amendments to the Age Discrimination in Employment Act, which allowed mandatory retirement of certain law enforcement officers and fire fighters. Age Discrimination in Employment Act of 1967, § 11(j, k), 29 U.S.C.A. § 630(j, k).

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## 4. Officers and Public Employees ⇐101.5(1)

Public employee pension rights are essentially in nature of expectancy, and are considered employee's reward for honest and efficient service; however, there is no requirement that employee avail himself of pension at early date.

## 5. States ⇐64.1(3)

Revival of enforceability of provisions of state pension statutes previously in effect after amendment to Age Discrimination in Employment Act did not result in divestiture or termination of pension rights, but rather determined required retirement date on which pension benefits were due and payable; thus, federal statute applied prospectively. N.J.S.A. 43:16A-5; N.J.S.A. 43:15A-59 (Repealed); Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

## 6. Civil Rights ⇐9.15

## Labor Relations ⇐257

Age at which firemen and police officers could be mandatorily retired from employment was not to be determined under terms of collective bargaining agreement, but rather, was controlled by state statute which had been revived by amendment to Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, § 4, 29 U.S.C.A. § 623 note.

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Before Judges PETRELLA, DREIER and BAIME.

*Ernest G. Ianetti* argued the cause in A-4578-86T5 for Edwin Boylan, et al (*Ernest G. Ianetti* on the brief; *Brown & Brown, P.C.*, of counsel).

*Patrice M. Connell*, Deputy Attorney General, argued the cause for respondents in A-4578-86T5 (*Michael R. Clancy*, Deputy Attorney General, of counsel; *Patrice M. Connell* on the brief).

*Arnold Steinhaus* appeared for Township of Irvington in A-4578-86T5.

*Glenn A. Grant*, Corporation Counsel, for City of Newark in A-4578-86T5 (*Alison Brown Jones*, Assistant Corporation Counsel, on the brief).

*Schlesinger, Schlosser, Foy & Harrington* on letter in lieu of *amicus curiae* brief on behalf of Firefighters' Association of New Jersey in A-4578-86T5 (*Thomas A. Gonzoph* on letter in lieu of *amicus curiae* brief).

*Segreto & Segreto*, attorneys for appellants William J. Comer, et al in A-5124-86T5 (*James V. Segreto* of counsel and on the brief).

*Ralph L. DeLuccia, Jr.* Corporation Counsel, for respondent City of Paterson in A-5124-86T5 (*Ralph L. DeLuccia* on statement in lieu of brief).

*John J. McKniff*, attorney for respondent City of Passaic in A-5124-86T5 (*John J. McKniff* on letter of nonparticipation).

*Frank J. Cozzarelli*, attorney for respondent Township of Belleville in A-5124-86T5 (*Frank J. Cozzarelli* on statement in lieu of brief).

*Joseph C. Dickinson*, attorney for respondent Township of Montclair in A-5124-86T5 (*Joseph C. Dickinson* on statement in lieu of brief).

*Mervyn R. Montgomery* attorney for appellant Alexander M. Beattie, Jr. in A-4833-86T5 (*Mervyn R. Montgomery* on the brief).

*Gorman & Goodkin*, attorneys for appellants Gioacchino Fiorentino, et al in A-4503-86T5 (*Bruce M. Gorman* on the brief).

*W. Cary Edwards*, Attorney General of New Jersey, attorney for respondents in A-5124-86T5, A-4833-86T5 and A-4503-86T5 (*Michael R. Clancy*, Deputy Attorney General of counsel; *Patrice M. Connell*, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

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## PETRELLA, P.J.A.D.

The appeals we consider in this opinion involve challenges to the enforcement of early mandatory retirement provisions for law enforcement officers and firefighters who are enrolled in the Police and Firemen's Retirement System (P & FRS) or the Public Employees Retirement System (PERS).<sup>1</sup>

The facts are not disputed in any of these appeals. All plaintiffs were advised by a February 19, 1987 directive issued by the Division of Pensions (Division) in the State Department of the Treasury, based on legal advice from the Attorney General, that they had to retire because they were over age 65. In the appeal brought by Edward Boylan and others, all of the plaintiffs serve as officers in various positions in police and fire departments. The plaintiffs include one police chief, four deputy chiefs, three police captains and one detective. They also include one fire chief, two battalion chiefs and two captains from fire departments. An additional plaintiff named in the complaint is one superintendent Nixon. Each plaintiff is between the age of 65 and 70 years and is a member of either the P & FRS or the PERS.

In the Comer appeal plaintiffs, paid fire chiefs in their respective municipalities, are between ages 65 and 70, and are members of the P & FRS. In the third appeal Beattie is a deputy fire chief who is 68 years of age. In the Fiorentino appeal the plaintiffs include a fire captain, the City of Ocean

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<sup>1</sup>There is also a Consolidated Police and Firemen's Pension Fund (Consolidated) which was established in 1952 to administer pension systems established under L.1920, c. 160, for municipal police and firemen pension systems for police and firemen who did not become subject to the P & FRS established in 1944. We were advised at oral argument in the *Boylan* appeal that there are only three or four participants left in that Fund, and that all are widows. Hence, we need not deal with any mandatory retirement ages under any other governmental pension plans. Four separate appeals were taken from the February 19, 1987 directive issued by the Director of the Division of Pensions in reliance on Formal Opinion No. 12 (1987) of the Attorney General. Essentially all appeals involve the same or related issues. We consolidate the separate appeals solely for the purpose of this opinion.

City, a collective bargaining representative and Firemen's Mutual Benevolent Association, Local 27.

The plaintiffs in each of these matters, with the exception of the Beattie appeal, instituted suit seeking injunctive relief against the enforcement of the mandatory retirement requirement. The matters were transferred to the Appellate Division in three of the appeals on orders entered by the trial court. Beattie took a direct appeal to this court from the mandatory retirement directive issued by the Division of Pensions and sought and obtained injunctive relief pending disposition of the appeal.

We hold that supervisory law enforcement officers who are not directly involved in law enforcement and supervisory firefighters who are not directly and primarily involved in firefighting are not subject to the federal exception to the allowed mandatory retirement of certain law enforcement officers and firefighters authorized by the 1986 federal amendments to the Age Discrimination in Employment Act and its general prohibitions against age discrimination.

# I

Although mandatory retirement, particularly for policemen and firemen, is not an unusual requirement, clouds of uncertainty arose as a result of competing concepts. On the one hand, employees and their unions through the collective bargaining process sought pension and retirement programs with greater benefits and the flexibility for earlier retirement. On the other hand, as life expectancies have grown, there has been concern expressed about refusals to hire people because of advancing age as well as forced early retirements. Out of this competition between employer and employee and old and young arose several other issues: the interest of some employees in early mandatory retirement for supervisors and people with greater seniority to create vacancies for younger people, as

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well as objections to forced retirement based on age without a reasonable and bonafide occupational requirement.<sup>2</sup>

New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* (L.A.D.), and its amendments since its original adoption in 1945, illustrates the competing interests of the young and the old. N.J.S.A. 10:5-2.1 provides that:

Nothing contained in this act or in the act to which this is a supplement shall be construed to require or authorize any act prohibited by law . . . nor to prohibit the establishment and maintenance of bonafide occupational qualifications or the establishment and maintenance of apprenticeship requirements based upon a reasonable minimum age nor to prevent the termination or change of the employment of any person who in the opinion of his employer, reasonably arrived at, is unable to perform adequately his duties, nor to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard, nor to interfere with the operation of the terms or conditions and administration of any bonafide retirement, pension, employee benefit or insurance plan or program. [emphasis supplied.]

New Jersey's enactments, discussed *infra*, were affected in various ways by developments with respect to the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), which became effective in 1968, and which was the subject of subsequent conflicting amendments. The ADEA made findings that arbitrary discrimination in employment because of age "burdens commerce and the free flow of goods and commerce." 29 U.S.C. § 621(a)(4). It barred discrimination in hiring or discharge on the basis of age, except where there either was "a bonafide occupational qualification" (BFOQ), or a pension or retirement plan was not a subterfuge

<sup>2</sup>See generally *Johnson v. Mayor & Baltimore City Council*, 472 U.S. 353, 364-365, 103 S.Ct. 2717, 2723-24, 86 L.Ed.2d 286, 295 (1985); *E.E.O.C. v. Wyoming*, 460 U.S. 226, 256, 103 S.Ct. 1054, 1070, 75 L.Ed.2d 18, 41 (1983) (Berger, C.J. dissenting); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 198-202, 98 S.Ct. 444, 448-450, 54 L.Ed.2d 402, 410-413 (1977); *E.E.O.C. v. State of New Jersey*, 620 F.Supp. 977, 995-998 (D.C.N.J.1985). Cf. *Hozer v. State, etc. Police & Firemen's Pension Fund*, 93 N.J. Super. 196, 199 (App.Div. 1967); Note, "Will You Still Need Me . . . When I'm Sixty-Four?: Forced Retirement for Executives under the ADEA," 11 U.Balt.L.Rev. 256, 264-266 (1982); Ruzicho and Jacobs, *Litigating Age Discrimination Cases*, § 1:10 at 23 and § 1:12 at 25 (1986).



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to evade the purposes of the ADEA. 29 U.S.C. § 623(f)(1) and (2).

In 1974 the ADEA expanded its definition of the term "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency..." 29 U.S.C. § 630(b)(2). Nevertheless, the states, including New Jersey, did not feel the impact of the ADEA at that time. This law was not considered applicable to the states because of a Tenth Amendment question, or at least that was an unresolved question. While the issues were being challenged in various federal courts, federal firefighters and law enforcement personnel were essentially exempt from the coverage of the act by virtue of the federal Civil Service Laws. Cf. 5 U.S.C. § 8335(b) and 5 C.F.R. § 831.09 *et seq.* (regulations relating to 5 U.S.C. § 8335(b)).

In 1983 the United States Supreme Court decided *FEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), which held that the extension of the ADEA to the states and local governments was not violative of the Tenth Amendment, but constituted a valid exercise of federal authority under the Commerce Clause. Essentially in response to that opinion then Attorney General Kimmelman issued a formal opinion which concluded that pension provisions for uniformed police officers and firefighters which required mandatory retirement prior to age 70 were unenforceable under the then effective provisions of the ADEA, unless it could be demonstrated that mandatory retirement ages were a bonafide occupational qualification. 5 *Op.N.J.Att'y Gen.* (1983).

The New Jersey Legislature then amended the L.A.D. in 1985 to provide in N.J.S.A. 10:5-2.1:

Nothing contained in this act or in P.L.1945, c. 169 (C. 10:5-1, *et seq.*) shall be construed to require or authorize any act prohibited by law ... nor to interfere with the operation of the terms or conditions and administration of any bonafide retirement, pension, employee benefit or insurance plan or program, including any State or local administered public retirement system, provided that



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the provisions of those plans or programs are not used to establish an age for mandatory retirement. [emphasis supplied.]<sup>3</sup>

Also in 1985 N.J.S.A. 10:5-12 was amended to provide:

It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bonafide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70 years of age; ... provided further that it shall not be an unlawful employment practice to require the retirement of any employee who for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if that employee is entitled to an immediate, non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred retirement plan, or any combination of those plans, of the employer of that employee which equals in the aggregate at least \$27,000.00; and provided further that an employer may restrict employment to citizens of the United States where such restriction is required by federal law or is otherwise necessary to protect the national interest.<sup>4</sup>

In the same 1985 amendments N.J.S.A. 10:3-1 was amended to provide that except for certain categories of employees, no governmental employees

... shall be required to retire upon the attainment of a particular age unless the public employer can show that the retirement age bears a manifest

<sup>3</sup>Underlined material represents addition by L.1985, c. 73, § 2, effective October 1, 1985. The bill had originally been conditionally vetoed by Governor Kean who returned it for reconsideration with his recommended amendments which were ultimately adopted by the Legislature.

<sup>4</sup>Underlined material added by L.1985, c. 73, § 3.

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relationship to the employment in question or that the person in the service of the State, or of any county or municipality thereof, is unable to adequately perform his duties.

Excepted from this prohibition were certain categories of State employees, including, to the extent involved here, "a member of a police or fire department employed in the service of the State or of any county or municipality thereof..." *Ibid.*

The next significant event insofar as it affects these appeals was the adoption by Congress in P.L. 99-592 of additional amendments to the ADEA in 1986 (the 1986 amendments) which became effective January 1, 1987 and were to be effective only until March 3, 1993. During this time studies were to be conducted by the United States Secretary of Labor and the Equal Employment Opportunity Commission and Congress was provided with the opportunity to further study and consider whether physical and mental fitness tests could be used to measure a law enforcement officer's or firefighter's ability to perform his duties. See 29 U.S.C. § 622.

The 1986 amendments accomplished several things. They limited applicability of the Act to individuals who are at least 40 years of age, 29 U.S.C. § 631, and, rather than eliminating the federal exemption for policemen and firemen, resulted in an amendment to the ADEA which extended the federal exemption from the act for firefighters and law enforcement officers to the states. Thus, 29 U.S.C. 623(i) was enacted to provide:

(i) [Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983.]<sup>5</sup>

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

<sup>5</sup>This is the heading which is not technically part of the act. See *State v. Greene*, 33 N.J. Super. 497, 500 (App.Div.1953).

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(2) pursuant to a bonafide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter. [29 U.S.C. 623(i)]

Law enforcement officers and firefighters were defined in 29 U.S.C. § 630 by the adding of the following two definitional subparagraphs:

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

The federal regulations relating to federal Civil Service definitions of law enforcement officers are inapposite to our resolution of the issues on this appeal, particularly in view of the peculiar two-tiered federal definition of law enforcement officer set forth in 5 C.F.R. § 831.903(a).<sup>6</sup> See also *Johnson v. Mayor, and Baltimore City Council*, 472 U.S. 353, 357, 105 S.Ct. 2717, 2719-29, 86 L.Ed.2d 286, 290 (1985).

Apparently at the request of the Director of Pensions, the present Attorney General, on February 11, 1987 issued a formal opinion regarding the 1986 amendments to the ADEA. 12 Op.N.J.Att'y Gen. (1987). The request was in response to the 1986 amendments and concluded that the mandatory retirement provisions in the State pension laws which were in effect on March 3, 1983 were now enforceable. The opinion letter noted that although the 1986 amendments became effective January 1, 1987, it might take several months to reimplement the

<sup>6</sup>We note also that under 5 C.F.R. § 831.906 "[t]he prohibition against the reemployment of firefighters and law enforcement personnel after age 60," required to retire by 5 U.S.C. § 8335(b), does not apply to positions which do not involve "the performance of actual firefighting or law enforcement duties as described in §§ 831.903(a) and 831.904(b)." See 5 C.F.R. § 831.906.

pension laws which had been held in abeyance because of the Federal preemption. Accordingly, the Division of Pensions determined that the mandatory retirement provisions governing P & FRS and the "law enforcement officer" provisions of PERS were to be reimplemented as of June 1, 1987.

Under PERS mandatory retirement was required for law enforcement officers<sup>7</sup> at age 65, unless the officer was a veteran and did not have 20 years of creditable service. *N.J.S.A. 43:15A-59*. Under P & FRS mandatory retirement for policemen and firemen was required at age 65. *N.J.S.A. 43:16A-5*. Essentially the Attorney General advised the Division of Pensions that the mandatory retirement age and maximum hiring age provisions "in the various State uniformed services pension statutes must be again enforced."

## II

Plaintiffs in the Boylan and Comer appeals argue that enactment of the 1986 amendments to the ADEA should not be construed to allow reinstatement of New Jersey's mandatory retirement ages for law enforcement officers and firefighters which had been held unenforceable in the Attorney General's 1983 opinion. See 5 Op.N.J.Att'y Gen. (1983). In concluding in 1986 that mandatory retirement ages were no longer unenforceable under the 1986 amendments to the ADEA, the Attorney General relied on *General Electric Co. v. Packard Bamberger & Co.*, 14 N.J. 209 (1953). He opined that the removal by the 1986 amendments of the federal preemption of retirement ages

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<sup>7</sup>Our reference to law enforcement officer does not include the State Police who are covered by a separate retirement system now known as the "State Police Retirement System of New Jersey." *N.J.S.A. 53:5A-4*. A federal District Court has held that mandatory retirement at age 55 for State Police Officers (other than the superintendent) was satisfactorily established as a bonafide occupational qualification. *E.E.O.C. v. State of New Jersey*, 631 F.Supp. 1506 (D.N.J.1986).

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previously held to exist in the ADEA had the result of reinstating New Jersey's statutes in effect on March 3, 1983.<sup>8</sup>

[1] Appellants Boylan and Comer argued that the extension of the ADEA to the states effectively repealed New Jersey's statutes authorizing mandatory retirements at specified ages. They then argued, relying essentially on *N.J.S.A. 1:1-3.2*, that the repealed statutes are not revived by the 1986 federal enactment, but must be specifically reenacted by the New Jersey Legislature.

The flaw in this argument is that the federal legislation could not repeal state statutes, but only resulted in a limited preemption with respect to certain portions of New Jersey's pension statutes. Hence, after the decision in *E.E.O.C. v. Wyoming*, *supra* (460 U.S. at 226, 103 S.Ct. at 1054, 75 L.Ed.2d at 18), every state was precluded from enforcing mandatory retirements prior to age 70. The law in New Jersey with respect to the viability of a state statute when preemption is withdrawn is governed by *Packard Bamberger*. There, in the context of the relaxation of federal restrictions against operation of a state statute with respect to interstate commerce, the court held that reenactment of the state statute was not necessary. *General Electric Co. v. Packard Bamberger & Co.*, *supra* (14 N.J. at 218). The court adhered to the proposition that:

'Where a state statute is declared unconstitutional or invalid because it is in conflict with federal legislation, the state statute is in effect merely unenforceable or suspended by the existence of the federal legislation.' [Citations omitted.] '... [T]he repeal of the federal statute reinstates or revives the state law without an express reenactment by the state legislature.' [*Id.* at 218-219; citation omitted.]

The court concluded in *Packard Bamberger* that the same principle "holds true where by express enactment Congress removes an obstacle to the operation of state legislation," unless there is some other constitutional violation. *Id.* See

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<sup>8</sup>*E.E.O.C. v. Wyoming*, *supra* (460 U.S. at 226, 103 S.Ct. at 1054, 75 L.Ed.2d at 18) was decided on March 2, 1983.

also I *Sutherland, Statutory Construction* (3 ed. Horack, 1943). Hence, the Attorney General correctly perceived that the first result of the 1986 federal amendments to the ADEA was to substantially reinstate New Jersey's public employee pension laws as they existed on March 3, 1983, but with one undealt with qualification discussed hereinafter.

### III

[2] We next turn to the argument that the ADEA does not apply to New Jersey's pension plans, or at the very least, that certain law enforcement officers not directly involved in law enforcement and certain firefighters not directly and primarily involved in firefighting duties are not subject to the federal exemption to the ADEA prohibitions against mandatory early retirement. Initially, we observe that although a formal interpretation of statutory provisions by the Attorney General may be "strongly persuasive" see *Evans Aristocrat Industries, Inc. v. Newark*, 140 N.J.Super. 226, 229-230 (App.Div.1976), aff'd 75 N.J. 84 (1977), that opinion is not binding on us. *Crisasi v. Governing Body of Bor. of Oakland*, 151 N.J.Super. 98, 101 (Law Div.1977), rev'd in part on other grounds, 156 N.J.Super. 182 (App.Div.1978).

It is clear that the 1986 amendments to 29 U.S.C. § 623 allowed the states to enforce their retirement laws which were in effect on March 3, 1983 if they were established as bonafide hiring or retirement plans that were not a subterfuge to evade the purposes of the ADEA. We have no hesitancy in accepting the proposition that neither P & FRS nor PERS are susceptible to attack as a subterfuge. Indeed, no party to these appeals even so asserts. Both plans have long-standing existence and the retirement benefits paid are substantial in relation to the terms of employment. See *Zinger v. Blanchette*, 549 F.2d 901, 909 (3rd Cir.1977) (railroad employee forced to retire under bonafide retirement plan); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 217 (5th Cir.1974). Further, the pension programs were designed to provide for actuarial soundness, *Spina*

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*v. Consolidated Police etc. Pension Fund Com.*, 41 N.J. 391, 396 (1964); *Siere v. Police and Fire Comm'n of Orange*, 6 N.J. 586, 591 (1951), thereby promoting a valid business purpose. See *McMann v. United Airlines*, 542 F.2d 217, 221 (4th Cir. 1976), rev'd 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977).<sup>9</sup>

[3] The 1986 amendments to the ADEA provided an exemption from the anti-age discrimination provisions for governmental employers in the hiring of firefighters and law enforcement officers pursuant to bonafide retirement plans which were in effect under State law on March 3, 1983 and are not subterfuges to evade the purposes of the federal act. 29 U.S.C. § 623(i). The difficulty arises here due to the definition of the terms "firefighter" and "law enforcement officer" contained in 29 U.S.C. § 630(j) and (k). Essentially firefighter is defined as someone whose duties are "*primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment.*" 29 U.S.C. § 630(j) (emphasis supplied). The definition goes on to include "an employee engaged in this activity who is *transferred* to a supervisory or administrative position." *Id.* (emphasis supplied). Likewise, "law enforcement officer" is defined as someone whose duties are "*primarily the investigation, apprehension or detention of individuals suspected or convicted of offenses against the criminal laws of a State.*" 29 U.S.C. § 630(k) (emphasis supplied). It also includes "an employee engaged in this activity who is *transferred* to a supervisory or administrative position." *Id.* (emphasis supplied).

Even viewing the definition of firefighters and law enforcement officers as limited to personnel primarily and directly involved in firefighting or primarily involved in law enforce-

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<sup>9</sup>The 1978 amendments to 29 U.S.C. § 623(f)(2) appear to reject the Supreme Court's decision in *McMann*. See also, S.REP. No. 493, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S.CODE CONG. & ADMIN.NEWS 504, 513; and H.R. CONF.REP. NO. 950, 95th CONG., 2d Sess. 7, reprinted in 1978 U.S.CODE CONG. & ADMIN.NEWS 504, 529.



ment, it is clear that the states are excepted from the general ADEA prohibitions against early mandatory retirement for those categories of individuals. We would have no difficulty in determining that Congress also created an exception to this general exception for certain supervisory public employees by its clear emphasis on primary and direct duties. However, the addition to the definitions in 29 U.S.C. § 630(j) and (k) of the phrase "... including an employee engaged in this activity who is transferred to a supervisory or administrative position" <sup>10</sup> creates an interpretation issue which has not been heretofore resolved or clarified and not capable of easy resolution. On the surface the transfer qualification might be considered broad enough to include the earlier limiting language. Indeed, the language has no clear or expressed purpose. Unlike the New Jersey statute, federal law allows an employee required to retire by 5 U.S.C. § 8335(b) to be reemployed until age 60. The implementing federal Civil Service regulations go on to state:

The prohibition against the reemployment of firefighters and law enforcement personnel after age 60 applies only to those positions involved with the performance of actual firefighting or law enforcement duties as described in [5 C.F.R.] §§ 831.903(a) and 831.904(b). [5 C.F.R. § 831.906]

The referenced definitions in the federal Civil Service regulations draw a dichotomy in the definition of "law enforcement officer" which essentially limits it to persons whose primary duties "require the investigation, apprehension or detention of persons suspected or convicted of offenses against the criminal laws of the United States" as opposed to only occasional or incidental involvement. 5 C.F.R. § 831.903(a).<sup>11</sup> Likewise, the

<sup>10</sup>The federal Civil Service regulations define supervisory and administrative positions and allow pension credits under prescribed conditions. See 5 C.F.R. §§ 831.903(c)(3)(i) and (ii) and 831.904(b)(3)(i) and (ii).

<sup>11</sup>Curiously, the federal regulations (which are concerned with benefit entitlements and the earning of service credits) also exclude a large category of people who could be considered law enforcement officers in New Jersey. In 5 C.F.R. § 831.903(a), the regulations state:



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regulations appear to limit the definition of "firefighter" to "an employee whose primary duties . . . require the performance of work directly connected with the control and extinguishment of fires, or the maintenance and use of firefighting apparatus and equipment." 5 C.F.R. § 831.904(a).

Our interpretation of the ADEA is not controlled by the application or interpretation of other federal statutes and federal Civil Service regulations because of the differences in the categories of law enforcement officers and firefighters, and because the federal firefighters and law enforcement officers have greater exemption from the ADEA. In our view, the word "transferred" in the applicable definitions in 29 U.S.C. § 630 are not meant to refer to promotions or direct appointments to positions of personnel who held lower positions in the department. To so read the quoted transfer clause would render meaningless and surplusage the words "primarily" and "directly" in the definition of "firefighter," and the word "primarily" in the definition of "law enforcement officer." See *Paper Mill Playhouse v. Millburn Tp.*, 95 N.J. 503, 521 (1984); *Matter of Sussex County Mun. Utilities Auth.*, 198 N.J. Super. 214, 216-217 (App.Div.1985), certif. den. 101 N.J. 267 (1985). In statutory construction we must strive to give effect to all the words of the statute in order to effectuate the legislative intent. See *Monmouth County v. Wissell*, 68 N.J. 35, 43 (1975).

In the absence of a clear Congressional definition of the quoted transfer clause, we are free to interpret it in a way which comports with the general sense of the federal statute

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... Law enforcement officer does not include an employee in a position the primary and regular duties of which involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected of violating the criminal laws of the United States, or whose duties only occasionally or incidentally require the investigation, apprehension, or detention of persons suspected or convicted of violating the criminal laws of the United States. [emphasis supplied.]

and the salutary purpose of the ADEA to bar discrimination in discharging an employee based on arbitrary age classifications.

Moreover, as we have noted, the federal statutes and regulations regarding firefighters and law enforcement officers were primarily concerned with eligibility for pension benefits and the method of obtaining entitlement to credits towards retirement. See *Ellis v. United States*, 610 F.2d 760, 764-765, 222 Ct.Cl. 65 (1979). Also, transfers to supervisory positions in the federal Civil Service system had to follow employment as a supervisor without a break in service of more than three days for credits to count. See 5 C.F.R. §§ 831.903(c)(1)(i) and 831.904(c)(1)(i). Hence, an appointment to a supervisory position would not result in obtaining such pension credits unless a firefighter primarily and directly engaged in firefighting and a law enforcement officer primarily engaged in specified law enforcement activities.

Because the federal regulations are concerned primarily with eligibility for merit bonuses and obtaining credits under the federal retirement acts, they provide little guidance here. Thus, the language regarding persons "transferred" to supervisory positions seems to exist as a remnant of hastily drawn federal amendatory legislation which carried over inapplicable parts of federal definitions from the federal Civil Service regulations into the exemption from the ADEA granted to the states from that act's applicability to law enforcement officers and firefighters. Cf. *Brotherhood of R.R. Trainmen v. C.R.R. of N.J.*, 47 N.J. 508, 518 (1966). In our view, the language respecting transfers is thus limited solely to transfers which are not bonafide promotions, but merely efforts to evade the applicability of the retirement provisions of state law.

An interpretation of New Jersey's statutes which allows high-ranking supervisors who are not involved primarily and directly in firefighting activities to fall outside the ambit of the mandatory early retirement provisions of P & FRS, and a similar interpretation with respect to such high-ranking officers

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in law enforcement whose duties are not primarily involved with apprehending criminals, is consonant with a proper interpretation of the ADEA and the LAD. The restriction of mandatory early retirement provisions to other than supervisory positions furthers the basic intent of both the federal and State laws against age discrimination. The exemption granted the states by the 1986 amendments to the ADEA must be construed and interpreted in accordance with the manifest intention of the entire legislation. Obviously, the intent was to limit the situations where early retirement could be mandated. Hence, a sensible interpretation of the definition of firefighter and law enforcement officer is warranted to further the broader purpose of preventing unwarranted age discrimination.

We thus conclude that supervisory law enforcement officers who are not directly involved in law enforcement and supervisory firefighters who are not directly and primarily involved in firefighting are not subject to the federal exception to the allowed mandatory retirement of certain law enforcement officers and firefighters authorized by the 1986 federal amendments to the Age Discrimination in Employment Act and its general prohibitions against age discrimination.

#### IV

The appellants in the *Boylan* and *Comer* appeals argue that there is no rational basis for forcing similarly situated police chiefs and fire chiefs to retire at different ages and that any statute conferring different retirement rights for one group constitutes unconstitutional special legislation and violates equal protection. We note initially that the United States Supreme Court has held that age is not a suspect classification. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520, 524-525 (1976). Unless it is shown that a classification lacks a rational relationship to a legitimate state objective, distinctions may be proper. See *Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp.*, 80 N.J.

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6, 40 (1976). Under the federal equal protection clause, dissimilar treatment of individuals similarly situated must be governed by an appropriate State interest. *Id.* at 37; see *Raybestos-Manhattan, Inc. v. Glaser*, 144 N.J.Super. 152, 185-191 (Ch. Div.1976), *aff'd o.b.* 156 N.J.Super. 513 (App.Div.1978).

The State points out that there is legitimate governmental objective insuring that firefighters and law enforcement officers are physically fit and capable to perform their functions. However, this argument is somewhat irrelevant since we are only talking about supervisors. Nothing in the record before us indicates that a 65 year old mandatory retirement age was established with reference to physical ability. Indeed, the legislative intent in enactment of the retirement programs for police and firemen related as much to the provision of benefits as to retaining qualified persons in firefighting and law enforcement until a reasonable retirement age was reached. See *Johnson v. Mayor & Baltimore City Council*, *supra* (472 U.S. at 364, 105 S.Ct. at 2723, 86 L.Ed.2d at 295); *Spina v. Consolidated Police & Firemen's Pension Fund Comm'n*, *supra* (41 N.J. at 396). Unless the retirement plans were shown, as is not the case here, to have been a subterfuge to avoid the purposes of the ADEA, there would be no need to consider whether the bonafide occupational qualification (BFOQ) exception would have to apply. See 29 U.S.C. § 623. However, since a subterfuge has neither been shown nor claimed with respect to PERS or P & FRS, there is no basis to inquire into whether the mandatory early retirement ages were established as a BFOQ exception. Since Consolidated<sup>12</sup> is not an operating retirement system as such, there is no basis for a determination that there is a violation of equal protection. Nor do we consider the

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<sup>12</sup>None of the appellants can rely on the provisions of the Consolidated fund laws since their enrollment in P & FRS and PERS is to the exclusion of other pension statutes. See N.J.S.A. 43:16A-19. As noted, Consolidated is presently essentially nothing more than a fund to maintain benefits for the few surviving participants (widows of former members) under presently non-existent pension plans.

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retirement statutes involved here special legislation. See *N.J. Const.* (1947) Art. IV, § VII, par. 9. These statutes apply equally to the classifications of firemen and law enforcement officers.

[4, 5] It is also argued that statutory changes are not to be applied retrospectively or in such a manner as to impair intervening rights, including reasonable expectations grounded in justifiable reliance. However, public employee pension rights are essentially in the nature of an expectancy. See *Sganga v. Police & Firemen's Pension Fund Comm'n*, 2 N.J.Super. 575, 579 (Law Div.1949). Pensions are considered an employee's reward for honest and efficient service. *Ballurio v. Castellini*, 27 N.J.Super. 113, 119, aff'd 29 N.J.Super. 383 (App.Div.1954). But there is no requirement that an employee avail himself of the pension at an early date. The revival of the enforceability of the provisions of the pensions statutes in effect in 1983 did not result in divestiture or termination of pension rights, but rather the determination of the required retirement date on which the pension benefits were due and payable. Hence, there is no merit in plaintiffs' argument that the statute should be applied prospectively because it affects their substantive rights. Indeed, as previously noted, the federal statute enacted in 1986 took effect prospectively on January 1, 1987.

#### V

Claims by certain plaintiffs that accrued sick leave, vacation time, personal leave and other pension benefits are affected are without merit. Such items are not entitlements which are governed by the pension statutes. Moreover, there has been no claim that any plaintiff is currently on sick leave or that other statutes or regulations do not apply with respect to eligibility and adjustment for such items.

[6] We turn next to plaintiff Fiorentino's contention that the age at which he can be mandatorily retired from his employment is to be determined under the terms of the collective

bargaining agreement which covers his employment. A provision therein stated that employees were to "retain all pension rights under New Jersey Law." When the labor agreement was entered into the ADEA prohibited age discrimination against individuals under the age of 70. The 1986 amendments completely removed the upper age level contained in 29 U.S.C. § 631, except that a special rule applied to firefighters and law enforcement officers.

The 1986 amendments to the ADEA contain language to the effect that the amendments are not applicable to collective bargaining agreements in effect on June 30, 1986 and which end after January 1, 1987 thereby permitting continued employment without regard to age. 100 Stat. 3342 § 7 (referenced in 29 U.S.C. § 623 note (1986)). Notwithstanding such a statement, the labor agreement does not supersede the federal statute. The labor agreement relied on here merely states that existing pension rights are retained. The applicable New Jersey laws have consistently provided that police and firemen must retire at age 65. Those statutes were never repealed. They were only temporarily unenforceable, and as previously discussed, the 1986 federal amendments merely revived the enforceability of those provisions. In addition, the pension statutes provide when credit years no longer accrue. The municipalities are not free to choose on an individual basis the retirement ages of law enforcement officers and firefighters.

Appellant Fiorentino also argues that the decision to terminate him from his employment as a member of the Ocean City Fire Department is vested in the municipality, and is not mandated by State law. He relies for this proposition on N.J.S.A. 40A:14-7 which authorizes municipalities to create and establish fire departments and provide for their maintenance and control, and to:

... appoint such members, officers and personnel as shall be deemed necessary, determine their terms of office, fix their compensation and prescribe their powers, functions and duties and adopt and promulgate rules and regulations

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for the government of the department and force for the discipline of its members.

Fiorentino also asserts, without citation of authority, that State law rarely prohibits participation in the police and pension system after the age of 65.

We note initially that N.J.S.A. 40A:14-17 provides:

Except as otherwise provided by law, in any municipality having permanent members and officers of a paid or part-paid fire department and force, the employment of said members and officers shall be for an indeterminate term and continuous during good behavior and efficiency.

Obviously, this section is by its own terms subject to provisions of other laws. The Legislature has provided that individuals who are participants in the P & FRS and PERS must retire at specified ages. Since the municipality, as a creature of the State, is subject to State law, *Dome Realty, Inc. v. Paterson*, 83 N.J. 212, 225 (1980), it may not establish mandatory retirement ages which are inconsistent with the statutes governing the applicable retirement system. See *Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Education*, 79 N.J. 574, 586-587 (1979). Thus, the municipality is bound by the requirements for retirement in the State pension laws to the extent enforceable under the 1986 amendments to the ADEA.

Accordingly, we remand all of the appeals herein to the Division of Pensions for reconsideration in light of our opinion and for determination of whether the respective duties of each of the plaintiffs in their individual positions fall within those categories delimited in 29 U.S.C. § 630(j) and (k). To the extent that the firefighters as so defined, and limited by our opinion herein, are not primarily and directly involved in the types of duties referred to in the cited section, they are not subject to mandatory early retirement. Likewise, to the extent that plaintiffs are "law enforcement officers" who are not primarily involved in the work defined in the federal statute, they are likewise excepted from the mandatory early retirement provisions of the New Jersey pension acts. As we have observed, the qualification with respect to those "transferred to a supervisory or administrative position" does not apply to bonafide



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promotions. Hence, to the extent that the plaintiffs are not involved in what we may refer to as "active" law enforcement or firefighting efforts, they would not be subject to the mandatory early retirement provisions of the subject pension statutes. However, to the extent that such personnel are susceptible to such assignment on a more than occasional basis they might well not be excepted from the mandatory retirement provisions. These matters are best determined in the first instance by the Division and the Pension Commission after development of a record. The determination of the Division is modified in accordance herewith. The stays of retirement previously ordered are continued pending the determination of the hearings on the remand.

Remanded for further proceedings consistent herewith. Jurisdiction is not retained.

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No. 89-1142

(2)

Supreme Court, U.S.

FILED

MAR 2 1990

JOSEPH E. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

DOMINIC FERLAUTO, JAMES KARAS, WILLIAM  
NIXON, THOMAS MARTIN and WILLIAM LUCK,

*Petitioners,*

v.

THE STATE OF NEW JERSEY, CITY OF JERSEY  
CITY, TOWNSHIP OF MONTCLAIR and  
CITY OF NEWARK,

*Respondents.*

On Petition For A Writ Of Certiorari To The  
Supreme Court Of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT  
OF CERTIORARI ON BEHALF OF RESPONDENT  
STATE OF NEW JERSEY

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## QUESTION PRESENTED

Whether this Court should review a decision of the New Jersey Supreme Court which held that administrative and supervisory law enforcement officers and firefighters are subject to mandatory retirement under the State's pension laws when the 1986 amendment to the federal Age Discrimination in Employment Act permitting the enforcement of the state mandatory retirement provisions automatically expires on December 31, 1993 at which time the State will cease to enforce its mandatory retirement statutes.

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## OPINIONS BELOW

The opinion below of the New Jersey Superior Court, Appellate Division is reported as *Boylan v. State*, 222 N.J. Super. 313, 536 A.2d 1283 (App. Div. 1988). The reversal thereof by the New Jersey Supreme Court is reported at 116 N.J. 236, 561 A.2d 552 (1989). Both opinions are contained in petitioners' unpaginated appendix.

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## STATEMENT OF THE CASE

On March 3, 1983 this Court decided that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, could be applied to the States consistent with the Tenth Amendment and constituted a valid exercise of federal Commerce Clause authority. *EEOC v. Wyoming*, 460 U.S. 226 (1983). After the *Wyoming* decision and until Spring 1987, the State of New Jersey did not enforce its uniformed services mandatory retirement statutes, including the New Jersey Police and Firemen's Retirement System ("PFRS") provision at issue here, since a factual basis did not exist at that time to establish their validity under the so-called "bona fide occupational qualification" ("BFOQ") provision of the ADEA, 29 U.S.C. §623(f), the only statutory exemption then available under the ADEA that would permit forced retirement under state law.\*

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\* A mandatory retirement age of 55 contained in the State Police Retirement System, *N.J. Stat. Ann.* 53:5A-8, was upheld by the United States District Court for the District of New Jersey as a BFOQ. *E.E.O.C. v. State of New Jersey*, 631 F. Supp. 1506 (D.N.J. 1986), *aff'd* 815 F.2d 594 (3rd Cir. 1987). The State Police Retirement provision is not involved in this case.

In October 1986, Congress adopted an amendment (the "1986 amendment") to the ADEA. *Pub.L. 99-592*. The 1986 amendment removed the age 70 "cap" so that, with a few exceptions, the protection of the ADEA covered all workers older than age 40. As it pertains to this case, the amendment provides that, for a seven year period from January 1, 1987 through December 31, 1993, state and local governments may, consistent with the ADEA, fail or refuse to hire, or discharge firefighters and law enforcement officers on the basis of age, if the officer has attained the age of hiring or retirement in effect on March 3, 1983 (the day following the *Wyoming* decision) pursuant to a bona fide hiring or retirement plan. 29 U.S.C. §623(i), as amended by *Pub.L. 99-592*.

The 1986 ADEA amendment defines firefighter and law enforcement officer as follows:

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, *including an employee engaged in this activity who is transferred to a supervisory or administrative position.*

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, *including an employee engaged in this activity who is transferred to a supervisory or administrative position.* For the purpose of this subsection, "detention" includes the duties of

employees assigned to guard individuals incarcerated in any penal institution. [29 U.S.C. §630; emphasis supplied.]

The Petition for Writ of *Certiorari* turns on the proper interpretation of these statutory definitions.

Pursuant to advice from the Attorney General, the Director of the New Jersey Division of Pensions issued a memorandum dated February 19, 1987 advising all affected public employers that in light of the ADEA amendment, the mandatory retirement provisions in the public safety retirement statutes would be enforced as of June 1, 1987. Beginning in mid-May 1987, petitioners, who were then all at least 65 years of age, initiated their actions in the New Jersey Superior Court, Law Division. Petitioners are deputy police chiefs (Ferlauto, Luck and Martin), a police captain (Karas) and a fire captain (Nixon). All of the petitioners obtained stays of their pending retirements and sought judgments declaring them to be not subject to the mandatory retirement provision in the PFRS statute. The matters were transferred to the Superior Court, Appellate Division for disposition. The stays of retirements were continued by the court.

In a January 20, 1988 decision the Appellate Division of the Superior Court of New Jersey found that the 1986 amendment was intended to permit the mandatory retirement, pursuant to state law, of officers "primarily" involved in line law enforcement duties and "primarily and directly" involved in firefighting duties, as described in the definitional provisions of the 1986 amendment. The Court therefore held that administrative or supervisory law enforcement and firefighting officers were subject to mandatory retirement only if they were "primarily" or

"primarily and directly" involved, respectively, in performance of such line duties. The court accordingly remanded the cases to the Division of Pensions for a case-by-case determination regarding which officers were primarily involved in those duties and therefore subject to retirement under the PFRS statute. *Boylan v. State*, 222 N.J.Super. 313, 536 A.2d 1283 (App. Div. 1988).

A Petition for Certification filed by the State was granted by the New Jersey Supreme Court, *Boylan v. State*, 111 N.J. 648, 546 A.2d 557 (1988). On August 2, 1989 that Court reversed the Appellate Division decision and held that the 1986 amendment to the ADEA permitted the mandatory retirement of firefighters and law enforcement officers involved in front-line or active duties as well as those who, like petitioners, were previously line public safety officers and who now served primarily in administrative or supervisory capacities. *Boylan v. State*, 116 N.J. 236, 561 A.2d 552 (1989).

In furtherance of the State Court's August 2, 1989 decision, the Board of Trustees of the Police and Firemen's Retirement System established a mandatory retirement date for the petitioners of October 1, 1989. Thereafter, petitioners requested a stay of the Board's Order from the State Supreme Court. The Court granted a stay until September 20, 1989 conditioned upon petitioners making an application for further restraints to a single Justice of the United States Supreme Court. On September 18, 1989 Justice Brennan denied petitioners' application for a stay.

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## REASONS FOR DENYING THE WRIT

The Writ sought here should be denied because the New Jersey Supreme Court correctly interpreted and applied the 1986 amendment to the Age Discrimination in Employment Act. Further, the issue presented here is not one of national importance; the ADEA amendment will expire by operation of law on December 31, 1993 and, to the best of respondent's knowledge, no other court has addressed the narrow issue raised here. *Certiorari* review is not warranted where the effect of any decision by this Court is likely to be limited both in scope and duration.

**A. This Matter Presents No Issue Of National Importance Which Warrants The Issuance Of A Writ of Certiorari.**

Petitioners have urged this court to grant its Petition for a Writ of *Certiorari* on the grounds that while the narrow issue is one of statutory construction, this court's interpretation of the subject statutory language will implicate issues of national importance. The facts simply do not support petitioner's contention.

In the three years since the 1986 ADEA amendment became effective, only *one* jurisdiction, New Jersey, has produced any reported decisions involving the enforcement of mandatory retirement provisions against administrative and supervisory public safety personnel. Either the other states did not have mandatory retirement provisions in effect on March 3, 1983 which, under the 1986 amendment, could then be enforced beginning January 1, 1987, or the other states elected not to enforce their mandatory retirement statutes, or public safety officers in

the remaining states did not challenge the enforcement of such statutes and thus created no litigation. In any event it is highly doubtful that a decision in this matter will affect anyone other than the petitioners and the limited number of public safety officers in New Jersey age 65 and over who occupy administrative and supervisory positions between now and December 31, 1993. Respondent notes that petitioners failed to inform this Court that the subject amendment automatically expires at the end of 1993.

The petitioners allege that the likelihood of multiple litigation on the state and federal levels requires this Court to definitively interpret the 1986 Amendment. Contrary to their contention is the total absence of any other litigation in any state or federal court dealing with the "transferred to a supervisory or administrative position" clause in the amendment. If there was to be multiple litigation, one would have expected to see evidence of it by now, yet petitioners can point to no other jurisdiction which has or is now addressing this statutory interpretation issue.\*

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\* In a companion motion filed with this Court, petitioners have asked the Court to defer consideration of the Petition until the Federal District Court in New Jersey decides the matter of *Gaita v. Forrester*, No. 89-4098, a case filed by some of the plaintiffs in the original *Boylan* case. On January 31, 1990, the Honorable Nicholas H. Politan, U.S.D.J., on cross-motions for summary judgment, dismissed the complaint for lack of jurisdiction. The court concluded that in the absence of proof that plaintiffs had complied with 29 U.S.C. §626(d) and filed ADEA claims with the Equal Employment Opportunity Commission at least 60 days prior to the filing of the District Court



Petitioners have cited several cases for the proposition that mandatory retirement has a detrimental effect on those subjected to it. While this may be so under certain circumstances, this is a matter best addressed to Congress and not to this Court. Congress has determined that the states may enforce their mandatory retirement provisions against public safety officers through 1993. Whether that is good or bad is not for this Court to decide.

Any decision on the merits here is likely to affect only a small number of individuals and then only for a short period of time. A Writ of *Certiorari* should be granted only for "special and important reasons." U.S. Sup. Ct. Rule 17. While the issue raised may be intellectually interesting, "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

**B. The New Jersey Supreme Court Correctly Determined That The 1986 Amendment To The Age Discrimination In Employment Act Authorized The State To Enforce Its Mandatory Retirement Provisions Against Administrative And Supervisory Law Enforcement Officers and Firefighters.**

The 1986 Amendment to the ADEA was enacted in direct response to this Court's March 2, 1983 decision in

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(Continued from previous page)

complaint, it was without jurisdiction to hear the matter. The restraints the court had earlier entered which prevented the State from implementing the State Supreme Court's August 2, 1989 decision were dissolved by Judge Politan on January 31, 1990. *Gaita v. Forrester*, No. 89-4098, slip op. at 14-15 (D.N.J. Jan. 31, 1990). At the present time there is no known case pending in any court on the issue raised by the Petition.



*EEOC v. Wyoming*, *supra*. In fact, Chief Justice Burger, in his dissent, noted that a majority of the states then had mandatory retirement laws for its public safety personnel which were rendered invalid by the court's decision. 460 U.S. at 253 n.2. The Chief Justice further noted that although Congress had made the ADEA applicable to the National Government, it had also built exceptions into the enactment. 29 U.S.C. §633a.

... I would still reject the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation of its own, Pub.L. 93-350, 88 Stat. 356, codified at 5 U.S.C. §8335, for law enforcement officers and firefighters. Over eight years have elapsed since the Age Act was extended to the states, yet early retirement is still required of federal air traffic controllers, 5 U.S.C. §8335(a) (1976 ed., Supp. V), federal law enforcement officers, §8335(b), federal firefighters, *ibid.*, employees of the Panama Canal Commission and the Alaska Railroad, §8335(c), members of the Foreign Service, 22 U.S.C. §4052 (1976 ed., Supp. V), and members of the Armed Services, 10 U.S.C. §1251 (1976 ed., Supp. V). [460 U.S. at 1074-75].

The effort to return to the states some control over the hiring and discharge of its public safety personnel began shortly after the Court decided the *Wyoming* case. During the legislative process, many legislators acknowledged that the states should be permitted to mandatorily retire public safety officers just as the federal government does. In drafting the amendatory language Congress looked to its own enactments dealing with mandatory retirement of federal public safety personnel, 5 U.S.C.

§8335; 5 U.S.C. §8331(20) and (21). Aware of how the courts had interpreted those provisions over the years, Congress borrowed the definitions of "law enforcement officer" and "firefighter" virtually *verbatim* from 5 U.S.C. §8331 for use in the 1986 ADEA amendment, thereby giving the states, for a period of seven years, the authority the federal government possessed to mandatorily retire its public safety personnel. The reliance on 5 U.S.C. §8331 was intentional.

❖ The petitioners urge this Court to reverse the New Jersey Supreme Court and to adopt the holding of the Superior Court, Appellate Division which found that only those administrators/supervisors whose primary duties involved "line" functions were subject to mandatory retirement. Petitioners would have this Court sanction a decision which ignored the legislative history of the 1986 Amendment, inexplicably rejected federal court interpretations of the identical language in 5 U.S.C. §8331(20) and (21) and tortured the language of the statute to achieve a result which effectively rendered the 1986 amendment inapplicable to New Jersey. The New Jersey Supreme Court, on the other hand, recognized the abundant legislative history behind the 1986 Amendment, acknowledged the federal court decisions interpreting the identical language in the federal mandatory retirement statutes and in its reversal of the Superior Court, Appellate Division, gave full meaning to the entire 1986 enactment.

Petitioners also claim that the federal court in *E.E.O.C. v. Com. of Mass.*, 672 F. Supp. 557 (D. Mass. 1987), considered "the very question" presented in its Petition. However, they have misread the District Court's decision.

There, the court was dealing with maximum hiring ages, not mandatory retirement. The court was asked only to determine if the duties of the entry level Motor Vehicle Examiner are primarily the "investigation, apprehension or detention of individuals suspected or convicted of offenses against the criminal laws" because the decision would establish if prospective Motor Vehicle Examiners were subject to the maximum hiring age in the Massachusetts statute. The issue of supervisory or administrative personnel was never raised in the case. That decision, therefore, provides no guidance in interpreting the statutory clause at issue in this matter.

The New Jersey Supreme Court correctly found that the definitional terms "law enforcement officer" and "firefighter" include not only officers presently performing "line" functions, but also those officers who once performed those duties, but have since been promoted to a supervisory or administrative position - in short, *all* officers in a police or fire department, from raw recruit to the chief of the department. By specifically including in the definitions of firefighter and law enforcement officer an employee who occupies a supervisory or administrative position, Congress thus declared in no uncertain terms that career officers who achieve such positions are subject to mandatory retirement to the same extent as other uniformed officers in the department.

Contrary to the petitioners' suggestion, there is nothing in the language of the Amendment that suggests that supervisors and administrators must be actively engaged in line firefighting or law enforcement duties to fall within this definition. Indeed, engrafting such a requirement

would deprive the qualifying language of any independent meaning, since the sole test would then be the "primary" performance of law enforcement and firefighting duties. Since such an interpretation renders the qualifying language meaningless surplusage, it was properly rejected by the New Jersey Supreme Court. *Application of Barker*, 559 F.2d 588 (Cust. Pat. App. 1977), *cert. den. sub nom. Barker v. Parker*, 434 U.S. 1064 (1978).

Only the New Jersey Supreme Court's interpretation, but not petitioners' suggested interpretation, gives full meaning to both aspects of the definition. The State's highest court construed those aspects as disjunctive rather than conjunctive criteria: that is, as encompassing both those officers now performing "primarily" line duties, and those who once did, but have since been transferred or promoted to supervisory or administrative positions. Any other interpretation effectively nullifies that part of the clause governing administrative and supervisory officers and firefighters.

**C. Cognate Federal Statutes And Legislative History Of The 1986 Amendment Demonstrate That The New Jersey Supreme Court Correctly Held That Purely Supervisory And Administrative Public Safety Personnel Are Subject To Mandatory Retirement Where Required By State Law.**

New Jersey's highest court analyzed the 1986 Amendment in light of the known legislative history and cognate federal legislation and concluded that Congress intended to provide the States with a mechanism for enforcing the state mandatory retirement provisions

which had been rendered unenforceable when *EEOC v. Wyoming*, *supra*, was decided.

The definitions included in the 1986 ADEA amendment were copied virtually *verbatim* from the definitions of "firefighter" and "law enforcement officer" contained in the federal civil service statute. Compare 29 U.S.C. §630(j) and (k) with 5 U.S.C. §8331(20) and (21). Both sets of definitions share the same purpose – the identification of the public safety personnel who may be subject to mandatory retirement.\* The civil service statute was consciously relied upon by Congress in drafting the 1986 ADEA amendment out of recognition that the federal civil service provision had been applied *since its enactment* to require federal public safety personnel to be retired at age 55, *regardless* of the duties performed by the particular officer. Accordingly, the parallel definitions in the 1986 ADEA amendment and the federal civil service statute should be given the same interpretation. *Northcross v. Board of Memphis City Schools*, 412 U.S. 427 (1973).

The scope of the federal civil service definitions and Congress' intent to provide the states with comparable parameters in the 1986 ADEA amendment is apparent

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\* The State does not deny that the federal officer retirement provisions have other purposes as well, *e.g.*, benefit entitlement. Because Congress acted to return control of the hiring and retiring to the states and localities to administer as they saw fit, the issue of benefit entitlement for non-federal firefighters and law enforcement officers is left up to the individual states and localities by the ADEA. However, the relevance of the federal retirement statute's basic purpose of requiring retirement across the board is not diminished by these secondary policy goals.

from judicial decisions interpreting the federal civil service statute and congressional references to that interpretation when it considered the 1986 amendment. For example, in *Ellis v. United States*, 610 F.2d 760 (Ct. Cl. 1979), the court addressed whether a civilian Navy employee met the definition of firefighter contained in 5 U.S.C. §8331(21) so as to qualify for early retirement benefits. The court unequivocally held that the second half of the definitional paragraph in 5 U.S.C. §8331(21) ("including an employee engaged in this activity who is transferred to a supervisory or administrative position") refers to someone who performs strictly supervisory/administrative functions when it noted that: "Ellis was not purely a supervisor as envisioned by the second half of the definitional paragraph." 610 F.2d at 765. Following the *Wyoming* decision, the need for a comparable exemption for state and local governments was recognized by Congress and it turned to the federal civil service statute as a model so that it could similarly craft an exemption that would encompass purely administrative and supervisory personnel as well as line officers.

The purpose of the 1986 amendment was not to introduce a novel and unprecedented distinction between "line" and "supervisory" officers for purposes of state and local retirement purposes, but instead to temporarily reestablish the status quo as of the March 2, 1983 *Wyoming* decision. The New Jersey Supreme Court correctly found that the 1986 amendment – if it is to accomplish that purpose – must therefore be interpreted to permit the retirement of all public safety officers, regardless of their duties, as the states did before that decision.



This straightforward objective was clear to all from the day the amendment was introduced in Congress. When the bill was first considered on the floor of the United States Senate for a vote on October 16, 1986, several senators commented on the purpose of the seven-year exemption for public safety officers. Senator Bradley, a co-sponsor of the legislation, noted:

. . . this amendment extends the exemption for the next 7 years to States and municipalities to allow them to determine retirement and entry ages for their own public safety officers and firefighters, just as Congress has done for similarly situated Federal employees . . . This compromise package merely offers State and local governments the option to exempt these same occupations regardless of whether the person works for the Federal Government or a State or local government. [*Cong. Rec.* S16854 (1986) (daily ed. Oct. 16, 1986)].

In construing a federal statute, contemporaneous statements made by a sponsor of the legislation are entitled to substantial weight. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). Clearly, Congress determined that for the next seven years state and local governments would have the same discretion as the federal government in setting the hiring and retirement ages of public safety personnel, so long as the ages chosen were not more stringent than those in effect on the day the Supreme Court decided *EEOC v. Wyoming*, *supra*.

Floor comments by key members of Congress during consideration of an earlier (but substantively identical) bill to that ultimately enacted as *Pub.L.* 99-592, confirm this conclusion. During House Committee hearings on H.R. 1435 (99th Cong. 1st Sess. (1985)), two sponsors of

the bill, Congressmen Hughes and Rinaldo of New Jersey, were asked by Sub-Committee Chairman Martinez if a bill could be drafted to make an exception for administrative personnel:

Mr. Martinez: We normally think of age-related ability in terms of jobs and activities associated with, let's say, the patrol officer or the firefighter who actually is on the ladder truck or actually involved in fighting the fire. But *there are certainly jobs that, regardless of what age one attains, can be done by people at an older age without the physical fitness requirement, for example, administration jobs, both in the police department and fire department.*

*In a bill that simply allows the States to set a retirement age somewhat based on physical ability, how do you deal with those people that could go on being productive to a city or a State or county based on their experience and knowledge?*

Mr. Hughes: . . . it would be very difficult. . . .

*It would just create a nightmare, it would seem to me. And in most instances you don't have that kind of flexibility within a department.*

The beauty of the provision is that most of these departments need the flexibility to be able to have individuals go out, if need be, on a truck, on an emergency, or in a patrol car, and can serve both purposes. And I would say the vast majority of departments fall into that category.

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Mr. Rinaldo: . . . I know in our State the head of the State police is over the mandatory retirement age and the State passed legislation allowing an exception. So, I guess you could do that in individual States. But I think it [i.e., the creation of



*an exception to the general federal definitional language] would create an administrative horror show if you tried to do it en masse. I think in rare instances it could be done in that fashion.*

Mr. Hughes: Can I just pick up on that? *I think it is important to let the States develop and custom tailor their own approach to the problem.*

\* \* \*

Mr. Martinez: On the basis of the inequity, I totally agree with you, that the States should at least have the rights that the Federal Government has given to Federal employees.

Although I agree with it, I am still always in the back of my mind thinking about those exceptions that I know about, that we all know about, that occur, and *I guess maybe right now the way they are being handled is by exemptions at a local level.*

. . . But, of course, as Congressman Rinaldo points out, *it might create more of a nightmare and more of a hassle and hazard than if we just left it to the discrepancy [sic; probably should read "discretion"] of the locals. [Exemptions for Police and Firefighters under the Age Discrimination in Employment Act, 1986: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 99th Cong. 2d Sess 6 (1986) (Statements of William Hughes and Matthew Rinaldo, Members of Congress)].*

This evidence of congressional intent must be respected in interpreting the 1986 ADEA amendment. *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964). As unequivocally demonstrated by the above colloquy, Congress intended any "exceptions" to police and fire retirement provisions to be established (if at all) at the

local level. The alternative of crafting a "partial" federal exemption was rejected, as noted by Congressmen Hughes and Rinaldo, because application of such a provision would "create a nightmare" and an "administrative horror show."

The New Jersey Supreme Court properly weighed the statute's clear language, its legislative history and cognate federal statutes in reaching the conclusion that petitioners are subject to the State's mandatory retirement provisions.

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### CONCLUSION

For the foregoing reasons, the petition for a writ of *Certiorari* in this case should be denied.

Respectfully submitted,

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